No. 85-6756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Where Mr. Hitchcock alleged that he was sentenced to death in violation of the Eighth and Fourteenth Amendments by the operation of Florida's pre-*Lockett* capital sentencing statute which enforced a "mandatory limitation" that only those mitigating circumstances "enumerated" in the statute could be considered, can the sua sponte summary dismissal of his claim be upheld?

2. Can the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis proffered in support of the claim has shown a large race-based disparity, and to a significant extent, has eliminated the most common nondiscriminatory reasons for it?

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CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 1514 (11th Cir. 1985) (en banc), and is set out at pages 120-142 of the Joint Appendix (JA). The opinion denying rehearing is reported at 777 F.2d 628 (11th Cir. 1985). JA 143-146. The panel opinion of the court of appeals is reported at 745 F.2d 1332 (11th Cir. 1985) and is set out at JA 89-118, together with the order granting rehearing en banc, JA 119. The Order and Memorandum of Decision by the United States District Court, Middle District of Florida, are unreported. JA 72-88.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on August 28, 1985, rehearing denied, November 19, 1985. Thereafter, Justice Powell entered an order extending the time within which to file the petition for writ of certiorari to and including April 18, 1986. The petition was filed on April 18, 1986 and certiorari was granted on June 9, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves Sections 921.141 *Florida Statutes* (1975) and the amended statute, Sections 921.141 (2), (3) *Florida Statutes* (1979). The text of these provisions are set out in Appendix A.

STATEMENT OF THE CASE

A. Course Of Prior Proceedings

Mr. Hitchcock was charged by indictment with first degree murder in connection with the death of Cynthia Driggers on July 31, 1976. After a brief hearing in which Mr. Hitchcock declined an opportunity to enter a plea of nolo contendere and be sentenced to life imprisonment, he proceeded to a jury trial and was convicted of first degree murder, in January, 1977, in Orange County, Florida. A capital penalty trial was held in February, the jury returned a sentencing verdict of death, and a week later the judge sentenced Mr. Hitchcock to death. The

conviction and sentence were affirmed on direct appeal. *Hitchcock* v. *State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960 (1982).

After completion of executive clemency proceedings, Mr. Hitchcock filed a motion for post-conviction relief in the state trial court pursuant to *Fla.R.Crim.P.* 3.850. He also filed pleadings requesting a stay of execution, and expenses for expert and lay witnesses. The motion was denied without an evidentiary hearing and a week later the Florida Supreme Court affirmed that denial. *Hitchcock* v. *State*, 432 So.2d 42 (Fla. 1983).

Mr. Hitchcock then filed his petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. Shortly thereafter, he filed motions for leave to amend the habeas petition, R 843, for expenses of witnesses and discovery, JA 30, and for an evidentiary hearing, JA 38. The motion for leave to amend the habeas petition was granted. The district court reserved ruling on all of the other motions, except the motion for evidentiary hearing, which it indicated would be granted. *See* JA 71; R VIII 53-63. However, the district court sua sponte entered an order summarily dismissing Mr. Hitchcock's petition for writ of habeas corpus pursuant to Rule 4, *Rules Governing Section 2254 Cases in the United States District Courts*. JA 72.

A divided panel of the Eleventh Circuit Court of Appeals affirmed. 745 F.2d 1332 (11th Cir. 1984); JA 89. Mr. Hitchcock's suggestion for rehearing *en banc* was granted 745 F.2d at 1348; JA 119. The *en banc* court, by a seven to five margin, reinstated the panel's judgment. 770 F.2d 1514 (11th Cir. 1985); JA 120. Rehearing was denied. 777 F.2d 628 (11th Cir. 1985); JA 143.

B. Material Facts: Offense

The panel opinion of the court of appeals briefly summarized the facts concerning the offense:

> Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Drigger's hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother, Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

745 F.2d at 1334; JA 90.[1] The offense occurred in Richard's house where James Hitchcock was also living. In the guilt-innocence trial, Mr. Hitchcock had attempted to present evidence regarding his family history in order to establish that his brother, Richard, was the more likely person to have committed the offense.[2]

In the sentencing trial, which followed thereafter, the state presented no additional testimony, TAS 6, and the defense presented, James "Harold" Hitchcock, another brother of petitioner, to establish the statutory mitigating circumstance regarding mental condition (*Fla. Stat.* § 921. 141(6)(b)). Harold testified that petitioner had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered." TAS 7-8. He also said that they had come from a family with seven children, which earned its livelihood by picking cotton, TAS

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[1] The following symbols will be used to refer to the record in the court below. "R" refers to the record on appeal filed in the court of appeals. The portions of the record of the state court proceedings contained as exhibits in the Record are referred to by the following designations: "T" denotes the transcript of the trial in state court; "TR" designates the record on direct appeal in the Florida Supreme Court; "TAS" refers to the transcript of the advisory sentencing proceedings; and "TS" denotes the transcript of the imposition of the sentence by the state judge.

[2] Most of this evidence was excluded. For example, the prosecutor's objections were sustained to questions regarding Mr. Hitchcock's behavior with children, T 732, 742, 743, 745, to questions regarding his father's death, T 736, 737, 741, 747, and to all questions regarding Richard's violent character, T 737, 741, 745, 748, 778. Mr. Hitchcock was prevented from testifying about his childhood family life. T 775. The only evidence that did come out, did so during Mr. Hitchcock's testimony in an effort to show why he falsely confessed to protect Richard—the fact that he left home at 13, T 773, and that his father died when he was six years old. T 775.

9-10, their father had died of cancer, TAS 8-9, and that petitioner had been close to Harold's children, TAS 10.

Thereafter, the jury recommended that the judge impose a death sentence, TAS 63, and he did. TS 7-8. In support of the sentence the judge found three statutory aggravating circumstances[3] and one statutory mitigating circumstance.[4]

C. Material Facts: Habeas Corpus

The facts pertinent to the issues-at-bar will be discussed in the argument, *infra*. Briefly, however, in support of his claims regarding the restriction upon consideration of mitigating factors, Mr. Hitchcock presented detailed allegations with regard to the facts on the face of the trial record, the status of Florida law, defense counsel's conduct of Mr. Hitchcock's defense under the view that he was restricted in the presentation and argument of mitigating evidence by the Florida statute, and the specific mitigating evidence that would otherwise have been available for presentation at the time. With regard to the discriminatory application of the death penalty, Mr. Hitchcock proffered two unpublished statistical studies that were available at the time of the filing of the habeas corpus petition. When it became available, Mr. Hitchcock supplemented this proffer with a pre-publication draft of a study conducted by Professors Samuel Gross and Robert Mauro. Since the district court summarily dismissed the petition there was no evidentiary development of the facts.

SUMMARY OF THE ARGUMENT

1. In 1972 Florida enacted a capital sentencing statute that confined consideration of mitigating circumstances to a narrow statutory list. *See, e.g., Cooper* v. *State*, 336 So.2d 1133, 1139

[3] "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery. . . . [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery. . . . The murder was especially heinous, wicked, or cruel." R 196-197.

[4] "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance . . . is applicable." R 197.

(Fla. 1976) (holding the statutory language was clear in using "words of mandatory limitation" to confine consideration to a nonexpandable "list" of mitigating factors, and thus "other matters have no place in [the capital sentencing] proceeding"). Accordingly, though on its face the Florida statute may not have *clearly* restricted consideration of mitigating factors at the time of *Proffitt* v. *Florida*, 428 U.S. 242 (1976), in its operation the statute clearly confined consideration of mitigating factors in precisely the same manner as the Ohio statute struck down in *Lockett*. It was not until after *Lockett* that another view was recognized. Mr. Hitchcock's trial occurred after the *Cooper* decision but before *Lockett*. The face of the state court record demonstrates that his sentencing trial was affected, for all parties followed the "mandatory limitation" of the statute. Beyond the record, Mr. Hitchcock alleged that his lawyer, in reasonable reliance upon the statute's limitation, forewent substantial investigation, presentation and argument of compelling available nonstatutory mitigating evidence, but no hearing to permit him to prove his claim has ever been held. Summary dismissal of this claim was erroneous, for his allegations show that Mr. Hitchcock was denied what the Eighth Amendment demands: a reliable, individualized capital sentencing determination.

2. Mr. Hitchcock alleged that he was sentenced to death under a statute which permitted racial discrimination to play a significant role. In support thereof he tendered statistical studies which revealed a large race-based disparity in the imposition of the death sentence in Florida: while 43.3% of all homicides involved black victims, only 10.9% of all the death sentences imposed were for black-victim homicides. The studies eliminated as well "the most common nondiscriminatory reasons" for this racial disparity, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981), by showing, through multiple regression analysis, that common nonracial factors could not account for it. Even outside the context of capital sentencing, these allegations established a prima facie case, whose only mission is to "permit [a rational] trier of fact to infer the fact at issue," *id.* at 254 n.7, not to establish that fact by a preponderance of the evidence. But

within the context of capital sentencing, where "there is a unique opportunity for racial prejudice to operate but remain undetected," *Turner* v. *Murray*, ___ U.S. ___, 106 S.Ct. 1683, 1687 (1986), and where "[t]he risk of racial prejudice infecting [the sentencing decision] is especially serious," *id.* at 1688, these allegations manifestly established a prima facie case. On these allegations, in a state whose history of racial discrimination is well-documented and extreme, the Constitution required evidentiary consideration.

ARGUMENT

I

FLORIDA'S PRE-*LOCKETT* CAPITAL SENTENCING STATUTE OPERATED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY ENFORCING THE "MANDATORY LIMITATION" THAT ONLY THOSE MITIGATING CIRCUMSTANCES "ENUMERATED" IN THE NARROW STATUTORY "LIST" COULD BE CONSIDERED

Mr. Hitchcock was sentenced to death under a rule of law that this Court has condemned as violating the most basic constitutional principle of capital sentencing. Presented squarely for the first time, is the issue of the actual operation of Florida's statute prior to 1978 to limit the consideration of mitigating factors to the statutory list. Though in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Court reviewed the facial constitutionality of Florida's capital sentencing statute, the actual operation of that statute was not examined. *Id.* at 254 n.11.[5] In this case, the statute operated in precisely the same manner as the Ohio statute subsequently struck down in *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

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[5] Recently the Court left open a question concerning the application of the Florida statute with regard to mitigating factors. In *Darden* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986) the Court rejected a claim of ineffective assistance of counsel for failure to present certain mitigating evidence. 106 S.Ct. at 2475. As an alternative, Darden had "claim[ed] that his trial counsel interpreted [the] statutory list of mitigating factors, as an exclusive list." *Id.* The Court "express[ed] no view about the reasonableness of that interpretation of Florida law, because in this case, the trial court specifically informed" counsel that he could "'go into any other factors'" *Id.*

A. Introduction: The *Lockett* Mandate Of Individualized Capital Sentencing

Since *Lockett*, it has become plain that the most fundamental Eighth Amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. *Lockett* invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating circumstances concerning the defendant and his crime created the constitutionally "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett* v. *Ohio*, 438 U.S. at 605 (plurality opinion),[6] and the Court has consistently demanded adherence to the *Lockett* principles.[7]

Therefore, today "[t]here is no disputing," *Skipper*, 106 S.Ct. at 1670, the force of the constitutional mandate. "What is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983).

B. Florida's Response To *Furman*: Limiting Mitigation By Statute

The constitutional necessity of individualized sentencing in capital cases was not, however, always so clear. The nine separate opinions in *Furman* v. *Georgia*, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with

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[6] All references to the *Lockett* decision herein will be to the prevailing, plurality opinion unless otherwise stated.

[7] The Court has also found constitutional error where a statute was applied so as to preclude the independent consideration of mitigating evidence, *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); where state evidentiary rules excluded such evidence, *Green* v. *Georgia*, 442 U.S. 95 (1979); and where the proffered evidence was rejected as irrelevant, *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669 (1986). *See generally Enmund* v. *Florida*, 458 U.S. 782, 827-28 (1982) (O'Connor, J., dissenting) (summarizing the Court's decisions concerning the mandate of individualized capital sentencing).

the Eighth Amendment." *Lockett*, 438 U.S. at 599.[8] States responded differently,[9] those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after *Furman*," *Lockett*, 438 U.S. at 599 n.7, and as a consequence some included provisions to limit the mitigating factors that could be considered. *See, e.g., Lockett id.*; *State* v. *Richmond*, 144 Ariz. 186, 560 P.2d 41, 50 (1976), *cert. denied*, 433 U.S. 915 (1977); *State* v. *Simants*, 197 Neb. 549, 250 N.W.2d 881, 889, *cert. denied*, 434 U.S. 878 (1977); *People* v. *District Court*, 586 P.2d 31, 33 (Colo. 1978).[10]

1. The 1972 Florida Statute

Florida was among those states that followed the "reasonable" view that *Furman* required restriction of mitigating factors. Prior to *Furman*, in March, 1972, the Florida Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be

[8] Florida fared no better than other observers in interpreting *Furman*. *See Donaldson* v. *Sack*, 265 So.2d 499, 506 (Fla. 1972) (Roberts, C.J., concurring) ("I have carefully read and considered the nine separate opinions [in *Furman*] and am not yet certain what rule of law, if any, was announced that has the support of the majority of the Court"). The legal advisors to the Florida Governor's committee studying capital punishment expressed similar views. Ehrhardt, Hubbart, Levinson, Smiley, & Wills, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. Crim. L. & Criminology 2, 3 (1973) (hereinafter cited as "Ehrhardt, et. al").

[9] *See generally* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974).

[10] One factor that influenced some states to restrict the circumstances which could be considered in mitigation was that several of the statutes stricken along with *Furman* had contained provisions for and lists of mitigating factors, but these "lists" were open-ended and nonexclusive. *See, e.g., Delgado* v. *Connecticut*, 408 U.S. 940 (1972). From these decisions commentators concluded that while there must be narrow categories of aggravating and mitigating circumstances, they must be exclusive so as to meet the requirements of *Furman*. *See* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1698-99 (1974); Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism*, 2 Fla. St. U.L. Rev. 108, 132-33 (1974); Note, *Florida Death Penalty: A Lack of Discretion?*, 28 U. Miami L. Rev. 723, 724 & n.12 (1974).

considered during the sentencing proceeding."[11] *Furman* supervened and this statute was never used. In the months after *Furman*, a mandatory sentencing scheme was seriously considered,[12] but after intense debate over the meaning of *Furman*, the Florida Legislature chose the Governor's proposal, consisting of a modified version of the Model Penal Code.[13] The statute that emerged restricted discretion by

[11] Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973) (hereinafter cited as Ehrhardt & Levinson). Florida's history therefore strikingly parallels that of Ohio. Both legislatures were in a similar posture at the time *Furman* was announced; both, as will be shown *infra*, reacted to *Furman* by making the lists of aggravating and mitigating circumstances exclusive. Ohio's history is reviewed in *Lockett*, 438 U.S. at 599 n.7.

[12] This proposal was vigorously advocated by the Attorney General. *See* Ehrhardt, et. al, at 3 & n.7; Ehrhardt & Levinson, at 12 n.28.

[13] A detailed contemporaneous analysis of the legislative history concerning the passage of Florida's capital sentencing statute is preserved in Ehrhardt & Levinson, *supra*. An overview of that history demonstrates that the statute that emerged restricted consideration of mitigating factors exclusively to the statutory list. The Governor's proposal with minor changes was the one that finally passed. Of relevance here, that proposal restricted aggravating and mitigating factors strictly to those listed in the statute. The Governor's panel of legal advisors had opined that: "In order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating] guidelines must evidently be made obligatory rather than merely advisory, otherwise the sentence can still be imposed in a completely capricious and arbitrary manner." Ehrhardt, et al., at 5. In the "whirl-wind four day special session" of the Florida Legislature, Ehrhardt & Levinson, at 21, three proposals were acted upon. A House committee passed a mandatory capital sentencing bill, *id.* at 13-14. The Governor's proposal, restricting aggravating and mitigating factors to the statutory list and also providing for a three-judge sentencing panel rather than a jury, was offered and approved (unanimously) as an amendment to the House bill. *Id.* at 14 & n.48. The Florida Senate passed a similar bill, except that it did not limit aggravating and mitigating circumstances to the statutory list, and it also provided that the jury was to be involved in sentencing. *Id.* at 14-15. At the conference committee on the evening of the last day of the Special Session, a compromise was reached. The limitation on aggravating and mitigating factors was retained from the House bill, and the provisions for the jury from the Senate bill was included (though only in an advisory role). *Id.* at 15. Accordingly, "[t]he final statute . . . adopted the limitations [on aggravating and mitigating factors] of the Governor's bill." *Id.* at 15 n.56. Another analysis of the Florida legislative history, likewise, finds that "the bill that was enacted as the 1972 death penalty statute incorporated the House's original intention to restrict mitigating circumstances to the factors enumerated in the statutory list." Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif. L. Rev. 317, 358 n.199 (1981).

listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist *as enumerated* in subsection[(5)]" and whether "sufficient mitigating circumstances exist *as enumerated* in subsection[(6)]"; then, "[b]ased on *these* considerations, whether the defendant should be sentenced to life or death." §§ 921.141 (2) and (3), *Fla. Stat.* (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. Through an undetected transcription error in the hurried special session, the words "limited to" were inadvertently dropped from the separate subsection listing mitigating factors. *See* Hertz & Weisberg, at 358 n.199. Nevertheless, the statute's embodiment of the "reasonable" view that *Furman* required mitigation to be limited was clear, for in actually determining the sentence the jury and judge were explicitly restricted to consideration of the factors "as enumerated" in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations."[14]

2. Implementation Of The Statute By The Florida Court

The statute was first construed in the seminal case of *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973), which emphasized that its

[14] Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 Fla. St. U.L. Rev. 108, 139 (1974). The transcription error resulting in the lack of parallel language in the lists of aggravating and mitigating factors was thus apparently unnoticed or at least not seen as having any significance by the commentators at the time. It is not mentioned in the Ehrhardt & Levinson treatise contemporaneously analyzing the new statute. Instead they emphasized that the "final statute . . . adopted the limitations of the Governor's bill," *id.* at 15 n.54, and contrasted the March, 1972 law that used a list of mitigating circumstances "only as guidelines" with the "new law" where "statutory lists of aggravating and mitigating circumstances are intended to narrow the scope of discretion in making the life-or-death decision." *Id.* at 17 (footnote omitted). *See also* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1704 (1974) (describing Florida's statute as one which "control[s] the sentencer's discretion by *delimiting the mitigating factors* which it may consider," (emphasis supplied)); Vance, *The Death Penalty After Furman*, 48 Notre Dame Law. 850, 860 (1973) ("The Florida statute sets up exacting guidelines where the death penalty is applicable—including statutory mitigating and aggravating factors").

primary mechanism for satisfying *Furman* was the itemization of specific aggravating and mitigating circumstances so as to restrain sentencing discretion. The opinion referred frequently and invariably to "the" mitigating circumstances citing the statutorily enumerated factors. For example, the court spoke of "the mitigating circumstances provided in *Fla. Stat.* 921.141(7), F.S.A." in describing how the sentence was to be decided. 283 So.2d at 9. The dissent likewise specifically noted the limitation on consideration of mitigating circumstances to those contained in the statute. *Id.* at 17 (Ervin, J., dissenting).[15] *Dixon*'s understanding of the exclusive nature of the statutory mitigating circumstances continued to be reflected in the court's opinions.[16]

The Florida court's next express pronouncement on the subject came in 1976. A few days after *Proffitt* it squarely faced the question whether the statute permitted consideration of evidence of nonstatutory mitigating factors and said with uncommon clarity that the statute strictly barred such consideration. *Cooper* v. *State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). In *Cooper* the Florida court affirmed the

[15] *See also Alford* v. *State*, 307 So.2d 433, 444 (Fla. 1975) ("the most important safeguard provided by *Fla. Stat.* § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which *must be determinative of the sentence imposed.*" (emphasis supplied)). This restriction to a statutory list of mitigating factors was also seen from *State* v. *Dixon*, *supra*, by commentators. Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 Fla. St. U.L. Rev. 108, 129 (1974); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1698, 1706 (1974); Comment, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia*, 1974 Ariz. St. L.J. 257, 280-81, 293-94.

[16] *See Alford* v. *State*, 307 So.2d at 444 (the statutory aggravating and mitigating factors "must be determinative of the sentence imposed"); *Slater* v. *State*, 316 So.2d 539, 540 (Fla. 1975) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); *Songer* v. *State*, 322 So.2d 481, 484 (Fla. 1975) (reviewing the death sentence by "relating the statutorily enumerated mitigating circumstances to the instant case" (footnote citing statute omitted)); *Henry* v. *State*, 328 So.2d 430, 431 (Fla. 1976) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); *Miller* v. *State*, 332 So.2d 65, 66 (Fla. 1976) (same).

exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." *Id.* at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation." *Id.* at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by *Furman:* "This [holding] may appear to be narrowly harsh, but under *Furman undisciplined* discretion is abhorrent whether operating for or against the death penalty." *Id.* (emphasis in original).[17] Accordingly, "[t]he *sole issue* in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the *itemized* aggravating and *mitigating circumstances.* Evidence concerning *other matters have* (sic) *no place* in that proceeding." *Id.* at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list."[18] It was not until after *Lockett* that another view was recognized.

3. The Florida Supreme Court Deals With Lockett

Lockett posed an obvious problem for the Florida Supreme Court. However, instead of admitting that its previous "man-

[17] It is relevant to note again that the legal advisory committee to the Florida Governor, whose bill eventually prevailed, had opined that "[i]n order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating] guidelines must be made *obligatory* rather than merely advisory." Ehrhardt, et al., at 5 (emphasis supplied).

[18] *See, e.g., Adams* v. *State*, 341 So.2d 765, 769 (Fla. 1977) ("none of the *statutory* mitigating circumstances were shown to exist" (emphasis supplied)); *Knight* v. *State*, 338 So.2d 201, 205 (Fla. 1976) ("consideration of the *enumerated* aggravating and mitigating circumstances support . . . death" (emphasis supplied)); *Funchess* v. *State*, 341 So.2d 762, 763 (Fla. 1977) ("trial judge carefully evaluated in detail each of the mitigating and each of the aggravating circumstances *set out in section 921.141*" (emphasis supplied)); *Barclay* v. *State*, 343 So.2d 1266, 1270 (Fla. 1977) ("the judge . . . meticulously identified in writing each aggravating and mitigating circumstance *listed in the death penalty statute*" (emphasis supplied)); *Harvard* v. *State*, 375 So.2d 833, 835 (Fla. 1978) ("The record discloses *no mitigating factors recognized by the statute*" (emphasis supplied)).

datory limitation" on mitigating circumstances conflicted with *Lockett* and resolving that conflict,[19] the court simply denied that there had ever been such a limitation in the statute or in its holdings. *Songer* v. *State*, 365 So.2d 696 (Fla. 1978). Said *Songer:* "Obviously, our construction of Section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." *Id.* at 700. Both the holding of *Cooper* affirming the preclusion of nonstatutory mitigating character evidence, and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by *Furman* was said to be "not apropos to the problems addressed in *Lockett.*" *Id. Cooper* was said to have been concerned only with whether the mitigating evidence was "probative," not with whether the evidence fell outside the statutory list of mitigating factors. *Id.*[20] With *Cooper* thus shunted aside, the court cited to six of its prior pre-*Lockett* decisions which, "among others," it said "obviously" showed that the statute was nonlimiting. Those cases were said to have approved trial courts' consideration of nonstatutory mitigating factors. In fact, as it has been accurately observed, the cited opinions "do not 'obviously' state" that proposition and in fact "suggest[] a contrary conclusion." *Songer* v. *Wainwright*, ___ U.S. ___, 105 S.Ct. 817, 821 n.9 (1985) (Opinion of Marshall, J., dissenting from denial of cer-

[19] Other states did confront the restriction in their statutes. *See, e.g., State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978) (finding a portion of the Arizona capital statute unconstitutional insofar as it restricted mitigation and ordering resentencing, *People* v. *District Court*, 586 P.2d 31 (Colo. 1978) (declaring statute unconstitutional under *Lockett*). It is pertinent to note that in each of these states the statutes had been seen as substantially the same as Florida's statute.

[20] In a later post-conviction decision in Cooper's case the court went further to explain that in its original *Cooper* decision, it had not even addressed the question of whether the mitigating character evidence fell outside the statutory list, because that issue, it said, had not been presented by Cooper. *Cooper* v. *State*, 437 So.2d 1070, 1071 (Fla. 1983) (*Cooper* II) ("In his initial appeal . . . Cooper raised the question of whether certain evidence he had proffered was probative and relevant to the *statutory* mitigating factors, and we answered the question in the negative" (original emphasis)). It then went on to say that the issue was defaulted for post-conviction and could not be excused by a change in law because "*Lockett* did not change the law of Florida." *Id.* at 1072.

tiorari).[21] *See also* Hertz & Weisberg, at 357 & nn.194, 195 (analyzing the cited opinions).

4. The Pre-Lockett Florida Statute Was Unconstitutional

A state court is, of course, free to interpret state statutes as it pleases. Its interpretation, once rendered, is binding upon the federal courts. *E.g.*, *Wainwright* v. *Stone*, 414 U.S. 21 (1973). A state court may change its interpretation of statutes to meet constitutional demands, *id.*, and by such reconstruction save the facial constitutionality of an otherwise unconstitutional statute. *Id.*; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 91-92 (1965). But all of this speaks to the future. A state court cannot unmake history by rewriting it. Thus, the "remarkable job of plastic surgery" that the *Songer* court performed on the statute and on its own prior construction of the statute does not "serve[] to restore constitutional validity" to sentences imposed under the earlier, unconstitutional procedure.[22] *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 153, 155 (1969).

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[21] Only three of the decisions cited in *Songer* had been announced prior to Mr. Hitchcock's trial in January, 1977. None of those decisions said anything about the propriety (or authority) of considering nonenumerated mitigating factors. In *Chambers* v. *State*, 339 So.2d 204 (Fla. 1976), the court found error in the imposition of the death sentence where the jury had recommended a life sentence. The court did *not* anywhere in the opinion discuss mitigation, except to quote the trial court's findings with regard to the "aggravating and mitigating circumstances *contained in Chapter 921, Florida Statutes*." *Id.* at 205 (emphasis supplied). Likewise, *Meeks* v. *State*, 336 So.2d 1142 (Fla. 1976), contains *no* discussion of mitigating factors except the quotation of the trial court order referring, by section numbers, only to the statutory mitigating factors. The death sentence in *Messer* v. *State*, 330 So.2d 137 (Fla. 1976), was reversed because the judge had denied Messer the opportunity to obtain psychiatric evidence to present to the jury pertinent to the statutory mitigating factor in § 921.141 (6)(b) (extreme mental or emotional disturbance). 330 So.2d at 142. Error was also found in the trial court's failure to apply the equal protection principle established in *Slater* v. *State*, 316 So.2d 539 (Fla. 1975), and to allow the jury to be informed of the codefendant's sentence so as to implement this equal-application principle. Thus, contrary to *Songer*'s characterization of these decisions, nothing in the opinions foretells anything but the exclusivity of the statutory mitigating factors.

[22] It is self-evident that the Florida statute as interpreted in *Cooper*, with its "narrowly harsh" "mandatory limitation" to an unexpandable statutory "list" of mitigating factors is indistinguishable from the Ohio statute struck down in *Lockett*.

Commentators have noted that the *Songer* decision represents an attempt to do just this: to evade the mandate of *Lockett* and save the constitutionality of prior Florida death sentences by a shift having no "fair and substantial support" in state law.[23] Their view is confirmed, implicitly but consistently, by judicial decisions which leave no legitimate doubt that the pre-*Songer* statute was applied restrictively to preclude consideration of any mitigating circumstances not expressly enumerated in it. The Eleventh Circuit has recognized the exclusion of nonstatutory mitigating circumstances decreed by *Cooper*.[24] This Court has noted the change in Florida law that removed restrictions on consideration of mitigating factors in

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[23] *See* Hertz & Weisberg, at 351 (Florida construed its statute "in such a way as to evade the effect of *Lockett*. . . [and] ignored statutory language and earlier case law to construe apparently exclusive statutory rosters as nonexclusive and [has] applied the new construction[] retroactively to validate sentences imposed under the previous, unconstitutional constructions"); *id.* at 356 (The *Songer* case is "so lacking in 'fair or substantial support' in state law as to be [a] subterfuge[] or pretext[] for evading a federal claim"); *id.* at 358 (same); Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 138 (1979) (criticizing the Florida Supreme Court for its "unwillingness in *Songer* to acknowledge that *Cooper* was wrongly decided and to rectify that error").

[24] *See, e.g.*, *Songer* v. *Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (state trial judge had interpreted the Florida statute as limiting the consideration of mitigating factors to the statutory circumstances); *id.* at 1495 (Clark, J., concurring and dissenting) ("Florida law, as reasonably and logically construed by both [counsel and the trial court], operated to preclude non-statutory mitigating evidence"); *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982) (finding that *Cooper* held that mitigating factors were limited exclusively to the statute); *Ford* v. *Strickland*, 696 F.2d 804, 812 (11th Cir. 1983) (en banc) (*Lockett* was a "direct reversal" of the *Cooper* holding that mitigating factors were limited to the statute); *Foster* v. *Strickland*, 707 F.2d 1339, 1346 (11th Cir. 1983) (in *Cooper* "the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances").

The treatment of pre-*Songer* Florida law by the court of appeals below in the present case was more guarded. The en banc majority acknowledged that "there was some ambiguity [in the Florida capital statute] as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated by the Statute." 770 F.2d at 1516; JA 122. The "confusion in Florida law surrounding nonstatutory mitigating evidence" was "finally alleviated" after *Lockett*. *Id.*

1978 after *Lockett*.[25] And courts in other states that had viewed their statutes as identical to Florida's before *Lockett* had also read those statutes as limiting mitigation consistently with *Cooper*.[26]

Since *Songer*, the Florida Supreme Court itself recognized on direct appeals in two cases that the trial judges had "misinterpreted" *Cooper* as precluding the consideration of nonstatutory mitigating factors.[27] In its own review of sentencing determinations, the court has sometimes persisted in referring to the mitigating circumstances "as set forth" in the statute.[28] For a time, its decisions in post-conviction cases raising *Lockett* claims were consistent only in denying relief under all circumstances: they held on a case-by-case basis that *Lockett* either

[25] *See Spaziano* v. *Florida*, 468 U.S. 447, 451 n.4 (1984) (recognizing the change in Florida law that occurred in 1978 from consideration of only "statutory mitigating circumstances" to "any mitigating circumstances"); *Barclay* v. *Florida*, 463 U.S. 939, 961 n.2 (1983) (same). *See also Songer* v. *Wainwright*, ____ U.S. ____, 105 S.Ct. 817 (1985) (order denying certiorari, Marshall, J., dissenting) (surveying the history of Florida law regarding the limitation on mitigating circumstances). As the Court noted, Florida amended its statute after *Lockett* to remove the "as enumerated" language from the subsections setting out the procedure to be followed by the jury and the judge for determining the appropriate sentence. *See* §§ 921.141(2), (3), *Fla. Stat.* (1979); App. 5a.

[26] For example, the Arizona Supreme Court, finding the Florida statute to be "indistinguishable from Arizona's statute" held that "the trial judge is bound, as are we, to consider only those . . . mitigating factors listed in the statute" and thus approved the judge's refusal to consider a nonstatutory mitigating factor. *State* v. *Bishop*, 118 Ariz. 263, 576 P.2d 122, 128 (1978). *See also State* v. *Simants*, 197 Neb. 549, 250 N.W. 2d 881, 889 (1977) ("the Florida Statute is very similar to the Nebraska statute in that the sentencing authority is required to weigh statutory aggravating and mitigating circumstances").

[27] *Perry* v. *State*, 395 So.2d 170, 174 (Fla. 1981); *Jacobs* v. *State*, 396 So.2d 713, 718 (Fla. 1981).

[28] In *Ford* v. *State*, 374 So.2d 496 (Fla. 1979) the court described its review process concerning mitigating factors:

> We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation. . . . *Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court . . . is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry.* . . .

Id. at 503 (emphasis supplied).

had or had not changed Florida law depending upon the results that would flow from these respective conclusions.[29] It is only this year, after the Eleventh Circuit's *en banc* decisions in the present case and *Songer* v. *Wainwright*, *supra*, that the Florida court has begun to face the problem directly.

In *Harvard* v. *State*, 486 So.2d 537 (Fla. 1986), the trial judge (who also heard Harvard's post-conviction motion) "expressly found that 'reasonable lawyers and judges . . . could have mistakenly believed that nonstatutory mitigating circumstances could not be considered,'" and that "'[t]he court certainly carried out its responsibility on the basis of that premise at time of Mr. Harvard's trial.'" *Id.* at 539. A divided Florida Supreme Court agreed and found Harvard's death sentence to have been "imposed in violation of *Lockett*." *Id.*[30] In *Harvard*, the Florida court further found "no factual dispute" concerning the allegation that Harvard's trial lawyer had also believed that Florida law precluded consideration of nonstatutory mitigating circumstances and so had failed to develop and present mitigating evidence at the sentencing hearing. It rejected a claim of ineffective assistance of counsel on these facts because, "given the state of the law at the time," counsel's conduct "reflects reasonable professional judgment." *Id.* at 540.[31]

[29] *Compare Muhammad* v. *State*, 426 So.2d 533, 538 (Fla. 1983) (trial counsel could not be "expected to predict the decision in *Lockett* v. *Ohio*"); *Jackson* v. *State*, 438 So.2d 4, 6 (Fla. 1983) (counsel's belief that "he could not present evidence of nonstatutory mitigating circumstances . . . was entirely reasonable"), *with*, *Cooper II*, 437 So.2d at 1072 ("*Lockett* did not change the law of Florida").

[30] The court said that it agreed with the similar result reached by the Court of Appeals for the Eleventh Circuit in *Songer* v. *Wainwright*, *supra*, but did not explain why it had declined to grant relief to Songer when he had presented his claim in *Songer* v. *State*, 463 So.2d 229 (Fla. 1985). *Harvard*, 486 So.2d at 538-39. In rejecting Songer's claim the court had relied upon its original *Songer* opinion which "held that neither the wording of section 921.141 nor our previous decisions precluded the introduction of nonstatutory mitigating evidence." 463 So.2d at 231.

[31] Still more recently in an appeal from a resentencing by a judge without a jury, the court remanded for resentencing with a jury because it appeared that at the defendant's original pre-*Songer* sentencing in 1977 the trial judge had interpreted the law as confining the jury to the statutory mitigating factors: "he instructed *only* on the statutory mitigating circumstances." *Lucas* v. *State*, 490 So.2d 943, 946 (Fla. 1986). The court's opinion recognizes that defense counsel also was apparently operating under the same restrictive belief. *Id.*

Thus, "[a]lthough the Florida statute approved in *Proffitt* [may not have] . . . *clearly* operated *at that time* to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," *Lockett*, 438 U.S. at 606-607 (emphasis supplied), it is no longer disputable that the statute did operate in precisely that manner, at least between the dates of *Cooper* and *Songer*. This Court's "assum[ption] . . . [in *Proffitt*] that the range of mitigating factors listed in the statute was not exclusive," *id.* at 606, was undercut only a few days later by the unmistakable holding in *Cooper*. And *Cooper*'s authoritative construction of the statute—which, of course, "fixes the meaning of the statute" for federal constitutional purposes "as definitely as if it had been so amended by the legislature," *Winters* v. *New York*, 333 U.S. 507, 514 (1949); *see, e.g.*, *Wainwright* v. *Stone*, *supra*—rendered the statute unconstitutional under *Lockett* at the time that Mr. Hitchcock was tried and condemned to die under it, in February of 1977.

That, without more, should suffice to invalidate his death sentence. The execution of a death sentence imposed pursuant to a federally unconstitutional statute would be inconceivable.[32] This is why, having invalidated the Ohio death-penalty statute in *Lockett*, the Court vacated all death sentences imposed under it in cases pending here, *Roberts* v. *Ohio*, 438 U.S. 910 (1978), and companion cases, *id.* at 910-11; *Adams* v. *Ohio*, 439 U.S. 811 (1978), and the Ohio Supreme Court subsequently ordered them all to be set aside, and the condemned inmates resentenced to imprisonment.

This makes sound practical sense. Picking and choosing among inmates sentenced to die under the same unconstitutional statutory regime—upsetting the death sentences of some but not of others, as the Florida Supreme Court is now

[32] In *Gilmore* v. *Utah*, 429 U.S. 1012, 1017-18 (1976), Justice White expressed the view that no person can properly be put to death under an unconstitutional statute, even with his consent. Although a majority of the Court disagreed, it did so only because "Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the [death] . . . sentence was imposed." *Id.* at 1013.

doing—makes no sense at all. As one Justice of the Florida court has pointed out:

> [I]t seems fundamentally unfair to me for one person to go to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered.

Jackson v. *State*, 338 So.2d at 7 (McDonald, J., dissenting).

The uncorrected application of the pre-*Songer* Florida statute is indeed "fundamentally unfair," for it calls into question the accuracy of sentencing decisions made during its tenure. In many cases its effect may have been subtle or invisible on the face of the record, though it operated powerfully at many levels, constraining the lawyers, the jury, the judge, and even review by the Florida Supreme Court. Given the radical inconsistency of the then-prevailing Florida law, with the basic mandate of the Eighth Amendment as construed in *Lockett*, it is impossible to deny that "the risk that the death penalty will be [inflicted upon James Hitchcock and others similarly situated] . . . in spite of factors which may call for a less severe penalty" is very high. *Lockett* v. *Ohio*, 438 U.S. at 605. The Court has emphasized that such a risk "is unacceptable and incompatible with the . . . Eighth . . . Amendment[]." *Id.*[34] Considering the consequences of erroneous decisions on a matter so grave as the imposition of society's ultimate punishment, the price of rectifying the risk of error by vacating Mr. Hitchcock's death sentence and others of like vintage "would surely

[33] In its next session after *Lockett* and *Songer* the Florida Legislature amended the capital sentencing statute to remove the "as enumerated" language that had been relied upon by the *Cooper* court as "words of mandatory limitation." 1979 Laws of Fla., Ch. 79-353. Thus, of the 230 inmates presently on Florida's death row, 26 or fewer who were sentenced before *Lockett* remain pending in post-conviction proceedings, and but 12 of these were sentenced after *Cooper*. The remainder were either sentenced or resentenced after the *Lockett* decision was announced. *See* Appendix B reviewing the present status of persons sentenced prior to *Lockett*. App. 6a-17a.

[34] *See, e.g.*, *Eddings* v. *Oklahoma*, 455 U.S. at 119 (O'Connor, J., concurring) ("we may not speculate as to whether the [state courts] actually considered all of the mitigating factors. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court").

be well spent." *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977) (plurality opinion).[35]

C. The Statute's Effect On Mr. Hitchcock's Sentencing

Even were it not so clear that Florida law in February, 1977 restricted the consideration of individuating evidence in mitigation to an extent forbidden by *Lockett*, Mr. Hitchcock himself would be entitled to relief under *Lockett*, for two reasons. First, it appears on the face of the record that all of the parties at Mr. Hitchcock's trial—the lawyers, the jury through counsels' arguments and the court's instructions, and the judge—adhered to this restrictive view of the statute. Second, in the present federal habeas proceedings, Mr. Hitchcock pleaded specifically, and made a sufficient showing to entitle him to prove that his defense attorney reasonably believed the statute restricted mitigation to enumerated factors, and consequently counsel forewent investigation, presentation and argument of substantial nonstatutory mitigating evidence.

1. The Record On Its Face Shows The Limitation On Mitigation

Mr. Hitchcock's trial occurred after *Cooper* but before *Lockett*, during the period when the Florida statute stood authoritatively construed "harsh[ly]" enforcing a "mandatory limitation" upon the consideration of mitigating factors. Viewing the record of Mr. Hitchcock's trial and sentencing solely on its face, the pervasive effect of the statutory limitation plainly emerges. *Everyone* in the proceeding manifestly operated on the premise that consideration of mitigation was strictly limited by and to the statute.

In describing for the jury the weighing process central to the Florida capital sentencing scheme, defense counsel referred only to the "several different aggravating circumstances and several different *mitigating circumstances that the judge is going to tell you that you are to consider in rendering an*

[35] *Cf. Turner* v. *Murray*, ____ U.S. ____, 106 S.Ct. 1683, 1688 (1986) (comparing the risk of an unconstitutional sentencing with "the ease with which that risk could have been minimized").

advisory verdict." TAS 17 (emphasis supplied). As predicted, the judge instructed only on the statutory mitigating factors: "The mitigating circumstances which you may consider shall be the following: [reciting the statutory list]." TAS 56.[36]

The prosecutor's argument likewise conveyed the limitation. He told the jury that the judge would instruct it on the "seven mitigating circumstances" and that "after you have considered all the aggravating circumstances, then *you are to consider the mitigating circumstances and consider them by number.*" TAS 27-28 (emphasis supplied). *See also* TAS 43-44 (prosecutor tells the jury to use "mathematics" to sum up the statutory aggravating and mitigating factors to determine the appropriate sentence).

Further, the judge's sentencing order clearly reveals his belief that he could consider only statutory mitigating factors in determing the appropriate sentence: "this Court finds that sufficient aggravating circumstances exist as enumerated in *Fla. Stat.* 921.141(5) to require imposition of the death penalty, and there are insufficient *mitigating circumstances, as enumerated in Fla. Stat. 921.141(6)*, to outweigh the aggravating circumstances." TR 192 (emphasis supplied). The judge's findings of fact in support of the sentence describe the process he undertook in determining it and plainly disclose his application of the statutory limitation:

> In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to *certain enumerated* "aggravating" and "mitigating" circumstances.

TR 195 (emphasis supplied).[37]

[36] Also, the judge had previously told the jury that he would "instruct you on the factors in aggravation and mitigation that you may consider under our law." TAS 5.

[37] Unlike the situation in *Songer* v. *Wainwright*, *supra*, and *Harvard* v. *State*, *supra*, where the original sentencing judges heard the state post-conviction motions and during those proceedings stated that they had earlier believed the statute limited consideration of mitigating factors, the original sentencing judge in Mr. Hitchcock's case did not hear his post-conviction motion. Thus, unlike in those cases, the record here does not contain an

It is therefore unequivocal upon the record that all parties viewed the statute as confining mitigation strictly to its four corners—a view consistent with the prevailing perception of *Furman's* requirements and with the "mandatory limitation" announced by the State's highest court in *Cooper*. And not only does the record on its face show the belief of all parties it also shows the effect of that belief on the proceedings.

Although defense counsel had been able to present some brief character evidence in the guilt/innocence phase of the trial to show that James Hitchcock's brother, Richard, was more likely to have committed the offense, and why James would have tried to cover up and accept the blame for Richard,[38] counsel's presentation in the penalty trial was limited to an attempt to establish a statutory mitigating circumstance. Counsel presented another brother's testimony that their father died when James was young and that James had "sucked on gas" and passed out once when he was five or six years old after which his "mind wandered." By this evidence, counsel attempted to show a basis for the statutory mitigating circumstance relating to mental condition, § 921.141(6)(b), *Fla. Stat.* (1975). Counsel refrained from arguing to the jury, as independent mitigating reasons calling for a sentence less than death, even the barebones character evidence that had previously made it into the record. Rather, counsel simply alluded briefly to some of the evidence, offering it "for whatever purposes you [the jury] deem appropriate." TAS 14. After this brief, restrained and enigmatic comment, counsel stuck

express finding by the original judge that he subjectively limited his consideration to the statutory mitigating factors. Nowhere on the objective record, however, does it appear that the judge applied anything but the "mandatory limitation" set down by *Cooper*. And as in *Lucas* v. *State*, *supra*, the fact that the judge instructed only upon the statutory mitigating factors is strongly indicative of the judge's belief that the statute limited the consideration of mitigation to the statutory roster.

[38] Most of this evidence had been excluded, however, on relevancy grounds. *See* p. 3 & n. 2, *supra*.

strictly to the meager statutory mitigating factors in arguing against the imposition of death. TAS 21-25.[39]

So, the record on its face reveals that the narrowly restrictive application of the statute actually infected this particular capital sentencing trial, "creat[ing] the risk that the death penalty [was] . . . imposed in spite of factors which call for a less severe penalty." *Lockett*, 438 U.S. at 606. As a result, Mr. Hitchcock was sentenced with the same disregard for individuating circumstances as were Monty Lee Eddings, Sandra Lockett and Ronald Skipper. He should not be denied the same constitutional relief.

2. The Facts Beyond The Record

Though the disregard of individualization was shown by the trial record itself, Mr. Hitchcock proffered a further showing in his state and federal post-conviction proceedings. He alleged and offered to prove that counsel formulated a strategy of penalty defense under the well founded belief that the Florida statute precluded the presentation of nonstatutory mitigating factors. His allegations speak to four points:

First, he alleged that Florida law at the time of his trial restricted mitigation to the statutorily enumerated factors. As we have shown above, this is not subject to serious dispute.

Second, he alleged that his lawyer at that time reasonably believed that only statutory mitigating factors could be offered for consideration. This allegation was supported by an affidavit of trial counsel.[40]

[39] In fact, on direct appeal in this case, the Florida Supreme Court noticed from the record the limitation by counsel. Presented with a facial challenge to the statute under *Lockett*, the Florida Supreme Court resolved it by saying that "it appears that the defense itself chose to limit that presentation [of mitigating factors]." 413 So.2d at 748. When, however, in post-conviction proceedings where the reason for that self-limitation was shown, *see* discussion, *infra*, the court said that the "claim boils down to merely another *Lockett* challenge." 432 So.2d at 43 n.2.

[40] This affidavit was appended to Mr. Hitchcock's motion for an evidentiary hearing. JA 38, 44. The court of appeals below faulted the affidavit for "not

Third, Mr. Hitchcock alleged that because of counsel's belief, counsel forewent pretrial investigation and preparation of evidence not falling with the statutory list of mitigating factors, for presentation in the penalty trial.

Fourth, he alleged and proffered significant evidence of nonstatutory mitigating factors that was available but, because of counsel's obedience to the statutory limitation, was not presented to or considered by the jury or judge in determining Mr. Hitchcock's sentence.[41]

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indicat[ing] . . . that he [counsel] would have done anything differently at that time." JA 124. There are two problems with this criticism. First, it is a product off the misreading of *Lockett* discussed, *infra*. Second, it was procedurally improper and unfair. It ignored the allegations in the habeas petition itself concerning counsel's failure to investigate or present evidence of nonstatutory mitigating factors, JA 15-22, and instead focused upon the affidavit alone as determinative of Mr. Hitchcock's rights. It thus adjudicated Mr. Hitchcock's *Lockett* claim by applying procedural requirements first explicated in the *en banc Hitchcock* opinion to an affidavit made before these procedures were explicated, and before it was known that affidavits of trial counsel would be used as the basis for adjudicating such claims in the way that the *Hitchcock en banc* opinion used them. The failure to give Mr. Hitchcock an opportunity to meet these newly announced requirements was clear error. *Cf. Smith* v. *Yeager*, 393 U.S. 122 (1968); *Blackledge* v. *Allison*, 431 U.S. 63, 83 n.6 (1977). Had he been provided the opportunity to meet the new requirements, he could have done so. Affidavits appended as an exemplary proffer to his rehearing petition in the court of appeals showed that because the requirement was not known, prior to the announcement of that court's opinion, Mr. Hitchcock's trial counsel *had not been asked* to say in his affidavit what he would have done differently. If asked, counsel would have said that he "would have argued to the jury that Mr. Hitchcock's family history and childhood background were independent mitigating factors." Moreover, with regard to the nonstatutory mitigating evidence proffered in these habeas proceedings, he "would have presented such evidence, had that evidence been available to me and had I known I had the legal right to do so." Affidavit of Charles Tabscott, Appendix to Petition for Rehearing, Eleventh Circuit Court of Appeals, filed September 16, 1985.

[41] The nonstatutory mitigating evidence proffered by Mr. Hitchcock included testimony from family, friends and others who have known Mr. Hitchcock throughout his life. Such evidence not only provides the basis for understanding Mr. Hitchcock as an individual but also demonstrates specific character traits relevant to his capacity for rehabilitation, and particularly his ability to adjust to and live peaceably in prison. This evidence is detailed in his habeas corpus allegations, JA 18-22, his motion for evidentiary hearing, JA 39-42, and the report of Dr. Elizabeth McMahon, JA 46-53, and will not be repeated here. The expert testimony of Dr. McMahon, in addition to confirming and placing in context Mr. Hitchcock's family and social history, would establish his capacity for self-improvement, and good prospects for living peaceably and being a positive influence in prison:

> James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor, was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstances than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. . . .
>
> If James' sentence were commuted and he were to be in "population," there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and he has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well. . . .
>
> Again, he is bright, articulate, capable of insight—all the characteristics which make one a good candidate for traditional psychotherapy.

JA 52-53.

Thus, Mr. Hitchcock has demonstrated by "specific factual allegations," *Blackledge* v. *Allison*, 431 U.S. at 76, a denial of an individualized sentencing determination every bit as damaging as the denials in *Lockett* and *Eddings*. As shown by the trial record on its face, and as elaborated in the allegations and in counsel's affidavit, defense counsel was obligated to make potentially mitigating arguments obliquely, through strained and inadequate efforts to shoehorn them into ill-fitting statutory categories, even where they were supported by the scant evidence that had gotten into the record for other purposes. More important, he forewent development of available, compelling mitigating evidence in unquestionably reasonable obedience to the limitations imposed by state law.

Since Mr. Hitchcock was denied a hearing on these allegations in both state and federal court, review is governed by the Court's well-established standards for summary dismissals. Such dispositions are proper in only two situations: if, assuming the truth of the allegations, the petitioner as a matter of law is conclusively entitled to no relief;[42] or where the allegations

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[42] *Blackledge* v. *Allison*, 431 U.S. at 74 n.4 (1977); *Townsend* v. *Sain*, 372 U.S. 293, 307, 312 (1963); *Machibroda* v. *United States*, 368 U.S. 487, 495-96 (1962).

are "patently false or frivolous" or "wholly incredible."[43] When properly viewed in light of *Lockett*, Mr. Hitchcock's claim could not have been summarily dismissed under these standards.

The court of appeals' opinion affirming its summary dismissal reflects a fundamental misunderstanding of the rule of *Lockett*. In essence, the court held that a *Lockett* error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a *different kind* of evidence and argument had he not been constrained by the unconstitutionally exclusive death penalty statute.[44] However, the holding of *Lockett* was not nearly this narrow.

In *Lockett* the presentence report presented a number of nonstatutory mitigating factors to the sentencer. 438 U.S. at 594, 597. While all of these factors could be considered by the sentencer, *id.* at 607-608, they "would generally not be permitted, *as such*, to affect the sentencing decision," *id.* at 608 (emphasis supplied), unless they "shed[] some light on one of the three statutory mitigating factors." *Id.* It was this aspect of the Ohio statute—precluding the sentencer from considering the nonstatutory mitigating factors in Sandra Lockett's case as "independently mitigating factor[s]"—that violated the Eighth Amendment. *Id.* at 607.

A violation of Mr. Hitchcock's rights can therefore be made out in *either* of two ways. First, since the statute's constraint upon counsel prevented counsel entirely from presenting cer-

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[43] *Blackledge* v. *Allison*, 431 U.S. at 76, 78; *Machibroda* v. *United States*, 368 U.S. at 495-96.

[44] In denying relief on Mr. Hitchcock's *Lockett* claim, the court of appeals held that

> the record belies the argument that at the time of the case, the presentation to the jury [by defense counsel] would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

770 F.2d at 1517; JA 124. Discussing counsel's "presentation to the jury," the court of appeals compared the evidence actually presented with the evidence that could have been presented if counsel had not been constrained, and it concluded that the same sort of evidence which could have been presented "was developed . . . to some extent for the jury." 770 F.2d at 1517-18; JA 124-25.

tain kinds of evidence because it bore solely upon nonstatutory mitigating factors, the Eighth Amendment was violated as it was in *Green* v. *Georgia*, *supra*, and *Eddings* v. *Oklahoma*, *supra*. Relevant evidence of these kinds was entirely excluded from the sentencer's consideration. Mr. Hitchcock's case is brought within this aspect of *Lockett* by the substantial nonstatutory mitigating evidence proffered below, which could have been developed and presented, but for the statute's prohibition.

Alternatively, Mr. Hitchcock demonstrated that the statutory constraint upon counsel obliged him to potentially mitigating points *indirectly*, by shoehorning truncated evidence of unauthorized mitigating factors into the mold of statutory categories instead of arguing that the nonstatutory mitigating factors independently called for a life sentence. This violation is indicated by the face of the trial record and elaborated by the allegations and affidavit below. Although, as the court of appeals noted, defense counsel's penalty argument "referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner turned himself in," 770 F.2d at 1518; JA 125, counsel *did not* argue that this evidence was sufficient, considered in its own right, to affect the sentencing decision. He rather argued that the jury should consider this evidence "for whatever purposes you deem appropriate," TAS 14, and then tried to argue that some of this evidence helped establish statutory mitigating factors. TAS 21-25. Just as in *Lockett*, the Florida death penalty statute prevented counsel from presenting the nonstatutory mitigating evidence "as an independently mitigating factor," 438 U.S. at 607.

It was alleged below, supported by detailed proffers, that the statute as then construed operated to restrict counsel's representation of Mr. Hitchcock by causing counsel to forego substantial preparation, investigation and argument of nonstatutory mitigating circumstances. As a consequence, the sentencing jury and judge were unable to consider significant nonstatutory mitigating evidence and were directed by coun-

sel's advocacy to consider only a narrow list of statutory mitigating circumstances as a basis for a sentence less than death. In short, counsel's obedience to the authoritative command of state law "impeded the sentencing jury's [and judge's] ability to carry out [their] task of considering all relevant facets of the character and record of the individual offender." *Skipper* v. *South Carolina*, 106 S.Ct. at 1673.

That the unconstitutional application of the statute was mediated through the obedience of counsel here does not distinguish *Lockett*. The constitutional right announced in *Lockett* is a right against the preclusion of consideration by the sentencer of evidence in mitigation of the penalty of death. Such preclusion violates the Eighth Amendment regardless of the mechanism that produces it. *Eddings* v. *Oklahoma*, 455 U.S. at 113-14. When defense counsel pretermits the preparation of nonstatutory mitigating evidence because a state statute declares the evidence inadmissible, its consideration by the sentencer is precluded. Effectuation of the defendant's *Lockett* right thus depends upon action which must be initiated by counsel; and if counsel forebears to take that action out of obedience to state law, the right has been defeated by state law operating through the agency of counsel. Counsel's inaction brings about the constitutional violation and cannot be used to condone it.

Under our adversary model of criminal procedure, defense counsel as well as the court determines the shape of the proceedings and the ultimate issues to be focused for decision. *See Herring* v. *New York*, 422 U.S. 853, 862-64 (1975). Counsel as well as the court may cause the proceedings to fall below constitutional standards for the trial of guilt or penalty. *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). Indeed, when the constitutional violation aphoristically described as "ineffective assistance of counsel" occurs, it is not simply that counsel has failed to do his duty, but that his failing "has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* "[T]he right to effective assistance of counsel is recognized not only for its own sake, but because of the effect it has on the ability of the

accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. at 658.

If counsel's actions in limiting his presentation on behalf of Mr. Hitchcock had been *un*reasonable—not dictated by a professionally competent understanding of the governing law or by an informed tactic—they would have raised a Sixth Amendment issue to be determined under Sixth Amendment standards.[45] Here, however, counsel's actions in obeying the statutory limitation were reasonable, because of the authoritative construction of the statute at that time, and because—as we shall further note below— there was no sound basis in federal constitutional law for challenging that construction. In this situation, the consequences of the statutory exclusion of non-enumerated mitigating factors from consideration in the capital sentencing process was the responsibility of the State, and violates the Eighth Amendment rule of *Lockett*.

This is not to say, obviously, that every instance in which a lawyer fails to present relevant mitigating evidence implicates the Eighth Amendment. It does not. What distinguishes the present case is the unique configuration of Florida law after *Cooper* and before *Songer*, which so clearly operated as a constraint upon counsel's performance.[46] Here it was the direct force of state law that precluded the marshalling of mitigating evidence for consideration by the sentencer, and thereby denied Mr. Hitchcock the "individualized decision [that] is essential in capital cases," *Lockett*, 438 U.S. at 605.

The situation is thus akin to cases in which defense counsel is restrained in his representation of one client by his representa-

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[45] Mr. Hitchcock alleged below, in the alternative, that if the courts deemed counsel's reliance upon the statutory limitation to be unreasonable, then he was denied the effective assistance of counsel under the standards set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). This alternative claim has never been reached, since counsel's reasonableness was accepted below.

[46] *See State* v. *Evans*, 120 Ariz. 158, 162, 584 P.2d 1149, 1153 (1978) (upon invalidation of the Arizona statute on *Lockett* grounds, defendant was remanded for resentencing even though he did not attempt to present any mitigating circumstances at his sentencing hearing, because a reviewing court must assume that "he was relying on the limitations on mitigating factors imposed by [the statute]").

tion of a codefendant with conflicting interests. *E.g.*, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). In deciding how to proceed in his presentation and framing of the issues for trial, counsel is expected and required to exercise selective judgment. *Jones* v. *Barnes*, 463 U.S. 745, 751-53 (1983). He "select[s] the most promising issues," *id.* at 752, in the light of the substantive rules laid down by statutory and decisional law to govern the adjudication of the case. When the applicable state statute, as authoritatively construed by the highest court of the jurisdiction, tells him that certain issues are off limits, it would be poor selective judgment indeed to prepare and present evidence going to those issues. Thus, counsel's preparation and presentation of evidence constitute both a response to, and an application of, state law. In the present case *Cooper*'s construction of the governing Florida statute told counsel to pretermit the preparation of nonstatutory mitigating evidence, and he did. The statute as construed constituted an external restraint that "adversely affected [the defense] lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). Undoubtedly, "the constitutional mandate is addressed to the action of the state." *Evitts* v. *Lucey*, ___ U.S. ___, 105 S.Ct. 830, 836 (1985). But under the unusual circumstances presented here, it was indeed the State, through its restraint of counsel, which "obtain[ed] [Mr. Hitchcock's death sentence] through a procedure that fail[ed] to meet the standards of due process of law." *Id.*

That a state's statute or procedure may act to hamper counsel's representation in a manner that denies a fair trial, is not a novel proposition. It has been recognized by the Court in a variety of contexts. *See United States* v. *Cronic*, 466 U.S. 648, 659 n.25 (1984) (citing cases). "When a State obtains a [death sentence] through such a trial, it is the State that unconstitutionally deprives the defendant of his [life]." *Cuyler* v. *Sullivan*, 446 U.S. at 343.

So, in an analogous area, concerning "procedural default,"[47]

[47]There is, of course, no "procedural default" issue in this case. As the Florida Supreme Court said in Mr. Hitchcock's post-conviction appeal:

> The record conclusively demonstrates . . . that the *limitation on mitigating evidence issue* has been raised previously, *has been fully considered*, and has been found to be without merit.

432 So.2d at 43 (emphasis supplied).

the Court holds that "cause" for a lawyer's performance—noncompliance with a procedural rule—is shown where "some objective factor external to the defense impeded counsel's efforts." *Murray* v. *Carrier*, ___ U.S. ___, 106 S.Ct. 2639, 2646 (1986). This objective external factor can include, under certain circumstances, the known state of the law. *Reed* v. *Ross*, 468 U.S. 1, 17 (1984). Where such "cause" is shown, the State must bear the consequences of a constitutional violation even though counsel's conduct may have contributed to its occurrence.

In Mr. Hitchcock's situation, Florida law as decreed by *Cooper* with regard to the permissible scope of mitigating factors quite plainly was an "objective factor external to the defense." It involved the construction of a statute that was reasonably seen as "sanctioned," *Reed* v. *Ross*, 468 U.S. at 17, indeed required, by *Furman*. That application was "well entrenched" in Florida at the time, *id.*, and in the prevailing weight of authority, *id.* Counsel's obedience to it was reasonable.[48]

[48] The case would be quite different, to be sure, if counsel had had the tools to challenge state law upon federal constitutional grounds but had elected not to do so as "a tactical decision to forego a procedural opportunity . . . and then, when he discover[ed] that the tactic ha[d] been unsuccessful, pursue an alternative strategy in federal court." *Reed* v. *Ross*, 468 U.S. at 14. Such conduct by counsel would "seriously implicate . . . the concerns that . . . require deference to a State's procedural bar." *Id.* at 15. But defense counsel's obedience to an explicit rule of state law precluding the consideration of nonstatutory mitigating circumstances prior to the holding in *Lockett* that such a rule was federally unconstitutional cannot be construed as such a tactical decision. Rather, "we may confidently assume that [it] . . . was because [counsel's course of action was] . . . sanctioned by [controlling state] . . . law and because [*Lockett*] . . . was yet [a year and a half] . . . away." *Id.* at 7.

Prior to *Lockett*, this Court had plainly implied that a state death-penalty statute was permitted and indeed required to provide "standards to guide a capital jury's sentencing deliberations," *Gregg* v. *Georgia*, 428 U.S. at 193, in such a way that "the jury's discretion is channeled," *id.* at 206, and "circumscribed by . . . legislative guidelines," *id.* at 207. It had invalidated a "mandatory death penalty statute in *Woodson* [v. *North Carolina*, 428 U.S. 280 (1976)] . . . because [such a statute] . . . permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.' *Id.*, at 304. The *Woodson* plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of

One other prudential reason supports the appropriateness of the State bearing the burden of the unconstitutional application of its statute. This involves the nature of the constitutional violation at issue. The Court has expressed a special concern where the "constitutional error . . . precluded the development of true facts . . . [and thus] serve[d] to pervert the jury's deliberations concerning the ultimate question whether [the defendant must be sentenced to death]." *Smith* v. *Murray*, 106 S.Ct. at 2668. Because a *Lockett* error involves a restriction

'relevant facts' it would require." *Lockett*, 438 U.S. at 604 (original emphasis). Not until *Lockett* itself was there any hint that it was beyond the power of a state legislature to guide a capital jury's sentencing deliberations by prescribing what specific characteristics of capital offenses and offenders were to be deemed mitigating.

Plainly, therefore, this is one of those "circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests," *Reed* v. *Ross*, 468 U.S. at 14, and when counsel's obedience to commands of state law whose unconstitutionality was "unknown to him" cannot be attributed to "strategic motives of any sort," *id.* at 15. Rather, counsel's obedience to the *Cooper* construction of Florida statutory law before there was a "reasonable basis in existing [federal constitional] law" to challenge *Cooper*'s proscription of the presentation of nonstatutory mitigating evidence, *id.* at 15, is just the sort of conformance to apparently valid state procedural rules which is expected of lawyers, *see id.* at 15-16, and by which "the cause requirement [of *Sykes* and *Engle*] may be satisfied" without doing violence to the concerns of those cases. *Reed* v. *Ross*, 468 U.S. at 14.

These conclusions are confirmed by an examination of the caselaw during the period between *Proffitt* and *Lockett*. In none of the 34 capital appeals considered by the Florida Supreme Court during this period does the court's opinion disclose a challenge to the *Cooper* construction of the Florida statute on grounds which anticipate *Lockett*. (Other constitutional challenges to the Florida statute do appear in a dozen of these cases.) *See* Appendix C, *infra*. During the same period, only three of 35 reported opinions of the Ohio Supreme Court and Ohio Court of Appeals reveal challenges to the Ohio statute on the ground that later prevailed in *Lockett;* and in these three opinions, the challenge is dismissed summarily. (Other constitutional challenges to the Ohio statute were made in all but a half-dozen of these cases.) *Id.* Claims anticipating *Lockett* had greater currency in Arizona, where they were raised in two out of 13 cases decided by the Arizona Supreme Court (7 of which raised other constitutional challenges to the Arizona statute), and eventually prevailed in a federal habeas corpus proceeding decided in April of 1978. *Id.* The emergence of claims such as Lockett's prior to this Court's *Lockett* decision itself largely dates from the publication of the Pennsylvania Supreme Court's opinion in *Commonwealth* v. *Moody*, 382 A.2d 442 (November 30, 1977); they are solecisms prior to that time.

upon the information available to the decisionmaker it concerns an "error [which] undermined the accuracy of the . . . sentencing determination." *Id.*

Just such a constitutional error has been shown in this case. Mr. Hitchcock alleged that the Florida statute severely curtailed counsel's development and presentation of mitigating evidence, and obliged counsel to shoehorn the limited evidence he did present into the mold of statutory mitigating circumstances. Thus, while counsel presented isolated fragments of what the court of appeals characterized as "the difficult circumstances of petitioner's upbringing," 770 F.2d at 1518; JA 125, these fragments *did not* reveal the most powerful influence in Mr. Hitchcock's life—his "upbringing in an environment of poverty"—as the court of appeals mistakenly said they did, *id.*, nor did they reveal the uniquely tragic consequences of the death of Mr. Hitchcock's father when he was a young child.[49] A person's life is more than a few unexplained biographical "facts."[50] Similarly, while counsel did present, as the court of appeals observed, some of Mr. Hitchcock's positive character traits which vaguely suggested the prospect of rehabilitation, these traits did not begin to paint a full picture of a person who

[49] The evidence of "difficult circumstances" that was presented was summarized by counsel as follows: Mr. Hitchcock grew up in a family of seven children supported by his parents picking and hoeing cotton; his father died when he was six or seven years old; and he left home at the age of thirteen in part because he did not get along with his stepfather. TAS 14-15. As alleged in the habeas petition, however, this evidence would, if fully developed, have shown that Mr. Hitchcock's family were tenant farmers living at a bare subsistence level, with food in scarce supply, with flour sack clothing and no indoor plumbing, and with the children working along with their parents in order to survive. Further, the evidence would have shown the deep, life-changing upheaval suffered by Mr. Hitchcock as a result of his father's death—that he struggled to rebound from the loss more than did the others, that the loss of the father triggered breakdown of the family since the father had kept the family together and maintained the love relationships within that family, and that when his father was taken from him, Mr. Hitchcock lost his sense of belonging, of family, and of roots.

[50] *Cf. Eddings* v. *Oklahoma*, 455 U.S. at 115 ("youth is more than a chronological fact" but rather importantly also reveals the "time and condition of life").

deserved to be spared from execution because of who he was.[51] Moreover, counsel did not argue that these were independently mitigating, TAS 15-17, but tried to shoehorn them into the statutory mitigating circumstance of age and youth. *See* TAS 23-24 ("there is a chance for this man, who is still young, who is capable [,] to eventually lead a good life").

When analyzed in the way that Mr. Hitchcock presented his claim—and in a way that accurately reflects the principles of *Lockett*—rather than as the court of appeals misconstrued it and *Lockett*, this claim unquestionably survives a Rule 4 review. Rather than "bel[ying]" the claim, as the court of appeals held, the record supports the claim. The trial record affirmatively and unequivocally shows that defense counsel acted under the unconstitutional constraints of the Florida death penalty statute, unable to argue the nonstatutory mitigating evidence as independently mitigating and obliged to force this evidence into the mold of statutory mitigating circumstances.[52] Moreover, the allegations of the habeas petition

[51] In light of the record, the court of appeals' statement that Mr. Hitchcock's "solid character traits, devotion to hard work, [and] willingness to contribute to the family's support" were "[a]ll . . . developed . . . to some extent for the jury," 770 F.2d at 1518; JA 125, can stand only if "to some extent" means "to a negligible and insignificant extent." With respect to the qualities of Mr. Hitchcock's character, counsel presented—again only in a minute way—evidence of Mr. Hitchcock's nonviolent character, obedience as a child, and honesty. *See* TAS 15-17. As alleged in the habeas petition, many additional positive traits of character could have been shown, including Mr. Hitchcock's devotion to hard work, generosity, genuine concern for others, and willingness to sacrifice himself for his family and for others. Moreover, direct evidence of his good prospects for rehabilitation could have been presented instead of the mere speculative inferences that were alluded to by counsel. A psychologist experienced in evaluating persons in prison could have presented these findings in compelling detail. *See* p. 24 n. 41, *supra*.

[52] The court of appeals' opinion, in one respect, suggests that the record does contradict Mr. Hitchcock's claim even when that claim is accurately framed. The court of appeals suggested, by lifting and connecting phrases out of several pages of counsel's argument, that counsel did argue that the nonstatutory mitigating evidence could be used independently to support a life sentence when counsel argued to the jury to

> look at the overall picture. You are to consider every thing together . . . consider the whole picture, the whole ball of wax.

770 F.2d at 1518; JA 125. This suggestion is misleading, however. An examination of the transcript where that quoted argument appears, TAS 49-52, reveals plainly that it was an effort to rebut the prosecutor's argument that the jury should use "mathematics" to compute the verdict by summing the number of statutory aggravating and mitigating factors, TAS 43-44. Defense counsel did *not* refer to any nonstatutory mitigating factors in the argument, but rather was merely trying to describe the weighing process of the Florida capital sentencing scheme. His argument does not in any way contradict Mr. Hitchcock's claim.

elaborate what the trial record implies: that counsel felt constrained to argue to the jury that only the statutory mitigatng circumstances could be considered, as such, in determining the sentence, and that, in the absence of such constraint, counsel not only could have argued that the nonstatutory mitigating evidence itself supported a life sentence, but also could have presented much more fully developed and persuasive evidence of the nonstatutory mitigating factors than that tentatively and fragmentarily adduced at the trial. These allegations unequivocally demonstrate "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is [sentenced to death] . . . illegally and is therefore entitled to relief . . . ." *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969). Upon such allegations, a Rule 4 dismissal was improper, for "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.*

D. Summary

Stripped of the embellishments of hindsight and speculation, Florida law prior to *Lockett* can be seen as it actually operated. Florida, together with other states and the weight of commentary, believed that to satisfy *Furman* it was required to restrict mitigation to an enumerated list of statutory mitigating circumstances, and it did so in clear and mandatory terms. *Cooper* so held unmistakably. That Florida was reasonable in this view is no more a justification than was Ohio's reasonableness in *Lockett*.

The case made here, both on the face of the trial record and as further alleged in the petition, is that the restrictive application of the statute severely affected Mr. Hitchcock's sentencing determination. It denied him what the constitution demands: a fair and reliably individualized capital sentencing proceeding.

The spirit of *Lockett* holds firm that the "character" of a person about to be sentenced for a capital offense, his worth as a human being and his fitness to live, are the crucial questions at this selection stage. Evidence bearing on the kind of person Mr. Hitchcock is would have allowed the jury and judge to see him as a human being. It would have suggested that his personality and motivation could be explained, at least in part, by his stormy and unhappy personal history, and it would have shown that there was a James Hitchcock worth saving. The sentencers here did not have the opportunity to know James Hitchcock's worth before deciding whether to take his life.

II

THE CLAIM THAT THERE IS SYSTEMATIC RACE-OF-VICTIM-BASED DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES IN FLORIDA CANNOT BE SUMMARILY DISMISSED WHEN THE STATISTICAL ANALYSIS PROFFERED IN SUPPORT OF THE CLAIM HAS SHOWN A LARGE RACE-BASED DISPARITY, AND TO A SIGNIFICANT EXTENT, HAS ELIMINATED THE MOST COMMON NONDISCRIMINATORY REASONS FOR IT

One of the remaining "badges and . . . incidents of slavery," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that still infects contemporary American society is the devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter nineteenth and early twentieth centuries, the degradation of black people led to open tolerances for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, *Custom, Law, and History: The Enduring Influence of Florida's "Black Code,"* Fla. Hist. Q. 277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. *See Briscoe* v. *LaHue*, 460 U.S. 325, 337-40 (1983) ("[i]t is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were

deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole.'" *Vasquez* v. *Hillery*, ____ U.S. ____, 106 S.Ct. 617, 624 (1986) (quoting *Rose* v. *Mitchell*, 443 U.S. 545, 558-59 (1979)). As Mr. Hitchcock's case and the case of Warren McCleskey demonstrate, it has continued to inform the decision to impose the death sentence for homicide in Florida and Georgia. Society's most severe criminal sanction is still imposed—as it historically has been—significantly less often when the victim of the homicide is black than when the victim is white.

Whether this kind of discrimination is intolerable under the Eighth and Fourteenth Amendments, and if so, whether it can be proven by a systematic (statewide) disparity in the imposition of death sentences that reflects the race of the victim as a significant factor in sentencing decisions, are questions presented directly by *McCleskey* v. *Kemp* (No. 84-6811). Although dependent upon the resolution of these questions in *McCleskey*, Mr. Hitchcock's case presents a more limited question.

In contrast to Mr. McCleskey, Mr. Hitchcock was given no opportunity to prove his claim of arbitrary and discriminatory imposition of the death penalty. Instead, his claim was summarily dismissed "as a matter of law" in the district court pursuant to Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*. JA 72, 87-88.[53] This

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[53] His claim had already been summarily disposed of in the state courts, because his allegations "did not constitute a sufficient preliminary basis to state a cognizable claim." *Hitchcock* v. *State*, 432 So.2d at 44. With this ruling, the Florida Supreme Court was simply restating its previously-determined basis for resolving this claim, first articulated in *Henry* v. *State*, 377 So.2d 692 (Fla. 1979) in reliance upon *Spinkellink* v. *Wainwright*, 587 F.2d 582 (5th Cir. 1978). Since *Henry*, the court has treated the claim summarily, by citation to prior decisions, as it did in Mr. Hitchcock's case. *See Adams* v. *State*, 380 So.2d 423, 425 (Fla. 1980); *Meeks* v. *State*, 382 So.2d 673, 676 (Fla. 1980); *Thomas* v. *State*, 421 So.2d 160, 162-63 (Fla. 1982); *Riley* v. *State*, 433 So.2d 976, 979 (Fla. 1983). For subsequent rulings, *see* n. 76, *infra*.

dismissal was affirmed in the court of appeals because his claim was based upon "the same statistical study" that the court had previously "rejected" in prior cases and that "[t]he Supreme Court has held . . . to be without merit." JA 106.[54]

Had the court of appeals' "reject[ion]" of this claim in prior cases been on the basis of evidentiary hearings in the district courts, its ruling in Mr. Hitchcock's case might have been unremarkable. However, its previous rulings were also solely on the basis of the allegations set forth in the pleadings.

Summary dispositions of this sort are allowed only in two circumstances: if, assuming the truth of the allegations, the petitioner is not legally entitled to relief;[55] or if the allegations are "wholly incredible."[56] Given the long-standing condemnation of racial discrimination in criminal proceedings, it is not likely that the court of appeals approved the summary dismissal of Mr. Hitchcock's claim on the basis of his not being entitled to relief as a matter of law. Surely if the allegations are true—that death sentences in Florida *are* imposed in significant part on the basis of racial considerations—Mr. Hitchcock is entitled to relief. *See, e.g., Zant* v. *Stephens*, 462 U.S. 862, 885 (1983); *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979); *Gregg* v. *Georgia*, 428 U.S. 153, 212 (1976) (White, J., concurring);

[54] The court of appeals cited *Wainwright* v. *Ford*, 467 U.S. 1220 (1984) and *Sullivan* v. *Wainwright*, 464 U.S. 109 (1983) as authority for the Court's "holding." However, both cases concerned the denial of stays of execution on this ground. In neither case did the Court grant certiorari as to this issue. Accordingly, these decisions do not stand for the proposition for which they were cited. Similar to a denial of certiorari, the denial of a stay "may not be taken . . . as a statement . . . on the merits." *Graves* v. *Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers). *See also Alabama* v. *Evans*, 461 U.S. 230, 236 n.* (1983) (Marshall, J., dissenting) (same). Notwithstanding, the court of appeals has continued to treat *Ford* and *Sullivan* as rulings upon the merits. *See, e.g., McCleskey* v. *Kemp*, 753 F.2d 877, 897 (11th Cir. 1985) (en banc) (in these cases, "the Supreme Court looked at the bottom line indication of racial effect and *held* that it simply was insufficient to state a claim" (emphasis supplied)).

[55] *See Machibroda* v. *United States*, 368 U.S. 487, 495-96 (1962); *Townsend* v. *Sain*, 372 U.S. 293, 307, 312 (1963).

[56] *See Machibroda* v. *United States*, 368 U.S. at 495-96; *Blackledge* v. *Allison*, 431 U.S. 63, 74, 76 (1977).

Furman v. *Georgia*, 408 U.S. at 310 (Stewart, J., concurring); *id.* at 249-51 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring).[57] Thus, the court of appeals' approval of the summary dismissal of Mr. Hitchcock's claim must have been based upon its view that the "statistical study" relied on by Mr. Hitchcock was wholly incredible.

In this light, the court of appeals' ruling raises the following question for determination by the Court: Can the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981)?

If the Court determines in *McCleskey* that race-of-victim-based discrimination in capital sentencing is forbidden by the Constitution, and that such discrimination can be shown by a systematic disparity in the impositon of death sentences that reflects the race of the victim as a significant factor in sentencing decisions, the question presented by Mr. Hitchcock must be decided. The Court's analysis of the sufficiency of the evidence to prove discrimination in *McCleskey* will not control the analysis of this question, because the question presented here goes to the allegations necessary to state a prima facie case of discrimination, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima face case depends solely upon the allegations made by the claimant. If the unrebutted allegations would permit a rational trier of fact to find discrimination, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. *Burdine*,

[57] Just last Term, the Court emphasized that the Constitution cannot tolerate even the "*risk* of racial prejudice infecting a capital sentencing proceeding. . . ." *Turner* v. *Murray*, ____ U.S. ____, 106 S.Ct. 1683, 1688 (1986) (emphasis supplied).

450 U.S. at 254 n.7 ("[t]he phrase 'prima facie case' . . . describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." *Bazemore* v. *Friday*, ___ U.S. ___, 106 S.Ct. 3000, 3009 (1986). Accordingly, whether Mr. McCleskey has proved discrimination cannot be determinative of whether Mr. Hitchcock has stated a prima facie case of discrimination.

In the remainder of his brief, Mr. Hitchcock will discuss the allegations presented in support of his claim and will then show why these allegations could not fairly have been dismissed without appropriate evidentiary consideration.

A. Mr. Hitchcock's Prima Facie Case: The Statistical Analysis Alleged In Support Of His Claim

In support of his claim in the district court, Mr. Hitchcock presented the findings of a multivariate statistical analysis conducted by Professor Samuel Gross and Professor Robert Mauro.[58] Comparing the data reported to the FBI by local police agencies concerning all homicides in Florida and seven other states[59] between 1976 and 1980, with similar data concerning the homicides during this period for which death sentences were imposed, Professors Gross and Mauro examined

[58] During the pendency of proceedings in the district court, the only available report of Professor Gross' and Professor Mauro's study was a "Tentative Draft" (dated June 29, 1983). Mr. Hitchcock filed this report in the district court as a supplemental appendix "to show a *prima facie* basis for [his] claim and in order to show a *prima facie* basis for an evidentiary hearing, payment of expert fees, . . . and for discovery concerning this issue." R 1111. The study has since been published as Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27 (Nov. 1984). References herein will be to the study as published.

[59] The other states were Arkansas, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. 37 Stan. L. Rev. at 49.

the effects of eight independent variables upon the sentencing outcomes of all homicides during this five-year period.[60]

Initially, Gross and Mauro found that 43.3% of the victims of homicide in Florida during this period (1683 out of 3486) were black, but only 10.9% of the death sentences (14 out 128) were imposed for black-victim homicides. *Id.* at 55. To determine whether non-racial factors might explain this extreme race-based disparity, Gross and Mauro examined eight factors for their individual and cumulative impact on the death sentencing determination: (1) the race of the defendant; (2) the race of the victim; (3) the commission of the homicide in the course of a felony; (4) the relationship of the offender and victim (stranger or nonstranger); (5) the killing of multiple victims; (6) the killing of a female victim; (7) the use of a gun; and (8) the location of the homicide (urban or rural). *Id.* at 49-66.[61] They found that five of these factors had a "strong aggregate effect" on the likelihood that a death sentence would be imposed: the commission of a homicide in the course of another felony, the killing of a stranger, the killing of multiple victims, the killing of a white victim, and the commission of the homicide by a black suspect. *Id.* at 55-56.[62]

Because the three non-racial factors were so highly correlated with death sentences, Gross and Mauro explored whether

[60] The data concerning all homicides was collected from Supplementary Homicide Reports that are filed with the FBI by local police agencies, and the data concerning homicides for which the death sentence was imposed was collected from *Death Row U.S.A.*, published by the NAACP Legal Defense and Educational Fund. 37 Stan. L. Rev. at 49-50. The process by which the researchers matched the homicides as reported to the FBI with the homicides for which death sentences were imposed is described at 50-54.

[61] These factors were identified because they are the subject of the FBI's Supplementary Homicide reports. *Id.* at 49.

[62] While the raw data showed that white homicide suspects were, on the whole, about twice as likely to be sentenced to death as black suspects, "the relationship between the suspect's race and the likelihood of a death sentence appears to be due entirely to the fact that black suspects were more likely to kill black victims and white suspects were more likely to kill white victims. Indeed, when we control for the race of the victim, blacks who killed whites were several times more likely to be sentenced to death than whites who killed whites in each state." *Id.* at 55-56.

any of these factors individually might explain the striking disparity in sentencing which appeared to occur because of the race of the suspect and victim. None did. Even when a non-racial factor highly associated with capital sentencing was present, the homicides which, in addition, involved white victims or both black suspects and white victims, were much more likely to result in death sentences. *Id.* at 56-61.[63]

In order to determine whether the racial disparities might be explained by a combination of the highly predictive, non-racial aggravating factors acting together, Gross and Mauro undertook two additional investigative steps involving multivariate analysis. *Id.* at 66-69. First, they examined for the cumulative effect of these variables by using a "scale of aggravation." *See id.* at 70-75 (categorizing all homicide cases by number of major aggravating factors present—0, 1, or 2-3). While this analytical step explained away the race-of-suspect disparity, the race-of-victim disparity persisted just as strongly.[64] Gross' and Mauro's findings on the "scale of aggravation" were also of extraordinarily high statistical significance. *Id.* at 74.[65] Second, they undertook a multiple regression anal-

[63] There was one exception to this finding with respect to the race of the suspect. "Controlling for both race of the suspect and felony circumstance does not dilute the capital sentencing disparities by race of victim but it does change the race-of-suspect pattern[:] . . . there are no substantial differences in capital sentencing rates between blacks who kill whites and whites who kill whites [in the course of committing a felony] in Florida." *Id.* at 57-58.

[64] "Controlling for level of aggravation . . . essentially eliminates any independent race-of-suspect effect. [The data] reveal[] only small and inconsistent differences in death sentencing rates between blacks who killed whites and whites who killed whites, at each level of aggravation." *Id.* at 71.

[65] Gross and Mauro report the overall level of statistical significance as p. <.001, and explain the concept of statistical significance (in terms of the "p-value") and the meaning of it at 71 n.118. While the Court is familiar with the meaning of statistical significance, its prior decisions have discussed significance in terms of "two or three standard deviations." *See, e.g., Castaneda* v. *Partida*, 430 U.S. 482, 496-97 n.17 (1977) ("As a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," that difference can be properly deemed not due to chance but instead to the operation of the factor tested for). Professors Baldus and Cole have explained that a rule requiring two or three standard deviations "is essentially equivalent to a rule requiring significance [in terms of "p-value"] at a level in the range below 0.05 or 0.01." D. Baldus & J. Cole, *Statistical Proof of Discrimination* 295-97 (1980). Thus the overall level of statistical significance reported by Gross and Mauro for the "scale of aggravation" analysis, p. <.001, is *ten times* stronger than the level of significance required by the Court in *Castaneda* to support an inference of discrimination.

ysis of the known variables affectng a Florida capital sentencing decision. *Id.* at 75-83.[66] Through this analysis, Gross and Mauro found, as well,

> large and statistically significant race-of-victim effects on capital sentencing in . . . Florida. . . . After controlling for the effects of all of the other variables in our data set, *the killing of a white victim increased the odds of a death sentence by an estimated factor of . . . about five in Florida.* . . .

Id. at 83 (emphasis supplied).[67]

To determine whether appellate review may have resulted in a correction of the wide racial disparities found at the trial level, Gross and Mauro also analyzed the racial patterns of death sentences affirmed by the Florida Supreme Court compared to the racial patterns of all homicides, controlling in the process for the most predictive non-racial aggravating factors. They found that the disparity between white-victim death sentences and black-victim death sentences persisted at a ratio of six to one (2.2% to 0.4%) and could not be explained by any of the non-racial predictors of capital sentencing. *Id.* at 90.

Before reaching their conclusions on the basis of these findings, Gross and Mauro undertook two additional steps of analy-

[66] *See generally Bazemore* v. *Friday*, 106 S.Ct. at 3008-3009 (explaining that multiple regression analysis is an appropriate evidentiary tool for the proof of discrimination because of its capacity to account for non-discriminatory factors that might explain racially disparate results).

[67] As Gross and Mauro explained, "In multiple regression, the coefficients of the independent variables are estimates of the size of the effects of these variables on the outcome variable. . . . [T]hese coefficients can be re-expressed in a more accessible form—as multipliers of the odds of the outcome. . . . [*Thus,*] [*i*]*n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim.*" *Id.* at 77-79 (emphasis supplied). The statistical significance for the results of this regression analysis was also p. <.001, again, *ten times stronger* than the *Castaneda* threshold. *See* n. 65, *supra*.

sis. First they considered whether information not included in their data might explain the racial disparities on non-racial grounds. In this regard, they reasoned that in order for an omitted variable to change the findings to any significant degree, the variable would have to meet three conditions: "(1) it must be correlated with the victim's race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis." *Id.* at 100. After analyzing several omitted variables in relation to these conditions,[68] they concluded: "[W]e are aware of no plausible [omitted variable] that might explain the observed racial patterns in capital sentencing in legitimate nondiscriminatory terms." *Id.* at 102.

Second, Gross and Mauro considered the findings of other research in order to assess the validity of their findings. They concluded that the findings of other research conducted in Florida "closely parallel" their findings showing a sizable race-of-victim-based disparity in capital sentencing. *Id.* at 102.[69]

[68] These included the strength of the evidence of the defendant's guilt and the criminal record of the defendant. *Id.* at 101.

[69] Gross and Mauro here cite to Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 Crime & Delinq. 563 (1980). 37 Stan. L. Rev. at 102. However, their earlier discussion of four other Florida studies, *id.* at 43-44, shows that the findings of other researchers as well were identical concerning the race-of-victim effect on capital sentencing decisions. *See* Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 Stan. L. Rev. 75 (1980); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 Harv. L. Rev. 456 (1981); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 Am. Soc. Rev. 918 (1981); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases* [now published at 19 Law & Soc. Rev. 587 (1985)]. While not cited by Gross and Mauro, three other studies have found the same racial effects. *See* Foley, *The Effect of Race on the Imposition of the Death Penalty* (paper presented to symposium of the American Psychological Association, September 1979) [proffered by Mr. Hitchcock in the district court as an appendix to his habeas petition, *see* JA 25-26]; Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 Crim. Just. J. 16 (1982); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067 (1983).

Further, the findings of other research confirm "that the racial patterns in capital sentencing that we have observed from 1976 through 1980 have been stable phenomena in . . . Florida . . . ." *Id.*[70]

With respect to research conducted in Georgia and Mississippi, Gross and Mauro found not only further confirmation of their findings, but more significantly, strong confirmation of the validity of their analytical methodology. The Baldus study in Georgia and the Berk study in Mississippi considered many more sentencing variables than Gross' and Mauro's study—"as many variables as one could ever hope to collect [information on] in a study of sentencing practices." *Id.* at 104-105. Since the major question concerning the validity of their study was the impact of omitted variables, Gross and Mauro believed it crucial to examine the effects on racial disparities of the inclusion of variables they could not take into account. Because Gross' and Mauro's study had also focused upon Georgia and Mis-

[70] This is so because the data analyzed in all of the other studies (except the Arkin study, 33 Stan. L. Rev. 75) was for the period 1972-1978 and was collected through a different process than that utilized by Gross and Mauro: It was collected by a field investigation method similar to that employed by Professor Baldus in Georgia. *See* Radelet & Pierce, *supra*, 19 Law & Soc. Rev. at 595-96. The process of data collection and the kind of data collected were described in Foley & Powell, *supra*, 7 Crim. Just. Rev. at 17-18:

> The information was gathered from court records by law students using a standard form. The data consisted of demographic information on the offender and victim, information concerning the offense, and information concerning the trial and its outcome. The demographic information consisted of: age, race, sex, education (of defendant and victim), occupation (of defendant and victim—unemployed, illegal occupation, unskilled, skilled, or professional), and prior convictions of defendant (none, misdemeanors, felony). Information collected on the offense included: crime as charged (every case studied was an indictment for first degree murder), additional offenses (whether or not there were any accomplices), county, and circumstances of the crime (spouse on spouse, parent on child, victim is other member of family, argument over money, argument while drinking, lovers quarrel, quarrel with someone other than lover, felony, possible felony), relationship between the defendant and victim (relative; lover; ex-spouse; estranged spouse or ex-lover; lover of spouse, ex-spouse, or present lover; friend; acquaintance; none), and weapons used (firearms, knives, other weapon, or hands). Information on the trial included: whether the trial was held or charges were dismissed, whether defendant pleaded guilty or not guilty, type of attorney (public defender, court appointed, or private), sentence recommended by jury, and sentence given by the judge.

sissippi, the studies by Baldus and Berk in those two states provided the opportunity. In comparing their findings in Georgia and Mississippi to the findings of Baldus and Berk, Gross and Mauro noted

> two important facts: (1) The race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

Id. at 104; *see also id.* at 104-105. Accordingly, Gross and Mauro concluded that

> the consistency between the Baldus and Berk findings and our own . . . validates our methodology. . . . The major potential problem with our study is the impact of omitted variables; the Baldus study indicates that given the variables that are reported in our data and analyzed in this article, it is unnecessary to our conclusion to control for other variables which are missing.

Id. at 105.[71]

On the basis of these analytical steps, Gross and Mauro concluded that "[t]he major factual finding of this study is simple: There has been racial discrimination in the imposition of the death penalty under [Florida's] post-*Furman* statute[]. . . . The discrimination that we found is based on the race of the victim, and it is a remarkably stable and consistent phenomenon. . . ." *Id.* at 105.

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[71] To a lesser extent than the Baldus and Berk studies, but still to a significant extent, studies by Foley and Powell (1982) and Bowers (1983), *see* n. 69, *supra*, lend further corroboration to the Gross-Mauro methodology for these same reasons. Because the Foley-Powell and Bowers studies utilized field investigation to collect data, *see* n. 70, *supra*, these studies analyzed the effects of more independent variables—fourteen in the Foley-Powell study, 7 Crim. J. Rev. at 18, and seventeen in the Bowers study, 74 J. Crim. L. & Criminology at 1072-73—yet still found sizable race-of-victim disparities in capital sentencing. Foley & Powell, at 19, 21; Bowers, at 1074, 1080, 1085.

B. The Allegations Set Forth In Support Of Mr. Hitchcock's Claim Are Not "Wholly Incredible" And Thus Are Not Subject To Summary Dismissal

A claim supported by factual "allegations [which], if proved, would establish the right to habeas relief," *Townsend* v. *Sain*, 372 U.S. at 307, may nevertheless be dismissed summarily if those allegations are "wholly incredible," *Blackledge* v. *Allison*, 431 U.S. at 74. "The critical question is whether [the] allegations, when viewed against the record . . . [are] so 'palpably incredible,' . . . so 'patently frivolous or false,' . . . as to warrant summary dismissal." *Id.* at 76 (citations omitted). Factual allegations are *not* wholly incredible under this test simply because they may appear "improbable." *Machibroda* v. *United States*, 368 U.S. at 495-96. Thus, if "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible," *id.* at 496, the claim which rests upon those allegations must receive appropriate evidentiary consideration.

When fairly considered, Mr. Hitchcock's claim, based upon the Gross-Mauro study and other studies of Florida capital sentencing decisions, cannot be found "wholly incredible."

As noted, the Court will determine in *McCleskey* whether race discrimination in capital sentencing can be shown by a systematic disparity in the imposition of death sentences that reflects the race of the victim as a significant factor in sentencing decisions. If discrimination can be shown by such evidence, a claimant's allegations must be "sufficient" in two respects in order to survive summary dismissal. First, the allegations must reveal racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in the imposition of death sentences. Second, the petitioner's allegations must sufficiently eliminate the potential nondiscriminatory reasons for the racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race," *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). While significant racial disparities alone would be enough in some circumstances to permit the inference of dis-

crimination, *id.* at 266 & n.13, these circumstances have been limited to cases involving "stark" disparities like those presented in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1073 (1886) (ordinance excluding 100% of Chinese citizens and 0% of non-Chinese citizens from further conduct of laundry business) and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960) (statute redefining the boundaries of Tuskegee, Alabama to "remove from the city all save four or five of its 400 Negro voters while not removing a single white voter"), and to jury composition cases which, though involving less extreme disparities, permit an inference of discrimination "[b]ecause of the nature of the jury-selection task. . . ." *Village of Arlington Heights*, 429 U.S. at 266 n.13. Neither of these circumstances is presented here, for the disparities are not as stark as those in *Yick Wo* or *Gomillion*,[72] and the jury selection task is far simpler than the capital sentencing task.[73] Accordingly, "a litigant who wishes to prove racial discrimination in sentencing must also show that plausible nonracial factors do not explain any apparent racial disparity." Gross, 18 U.C.D. L. Rev. at 1310.

Mr. Hitchcock's allegations reveal that the magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. *McCleskey* v. *Kemp*, 753 F.2d at 897.[74]

[72] In comparison to those cases, where the disparities were or nearly were 100 percentage points, the racial disparity in Florida's capital sentencing decisions is 32.4 percentage points (43.3% of homicide victims are black but only 10.9% of all the death sentences imposed are for black-victim homicides).

[73] *See* Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C.D. L. Rev. 1275, 1309-1310 (1985) (explaining why racial disparity alone can permit the inference of discrimination in jury-selection cases, since "no criteria other than eligibility are supposed to be considered," and in contrast, why racial disparity alone cannot permit a similar inference in capital cases, since "many factors are supposed to be considered in sentencing").

[74] The method for computing this expression of "odds" is described by Gross and Mauro, *supra*, 37 Stan. L. Rev. at 77.

In *McCleskey*, the court of appeals held that a racial disparity of this magnitude was insufficient to permit an inference that race has been a consideration in the imposition of capital punishment. *Id.* at 896-97. As Mr. McCleskey has demonstrated in his brief before this Court, however, in reaching this conclusion the court of appeals misunderstood the disparity reflected by these figures and severely mis-appraised its magnitude.[75] *See also* Gross, 18 U.C.D. L. Rev. at 1304-08 (showing the extraordinary magnitude of discrimination reflected by these figures in comparison to similar "odds" figures in other contexts). If the Court finds in *McCleskey* that a race-based disparity of this magnitude in capital sentencing is of constitutional concern—as Mr. Hitchcock submits it is—Mr. Hitchcock's allegations will have revealed racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in capital sentencing decisions in Florida. Accordingly, this aspect of the prima facie case will have been shown by Mr. Hitchcock's allegations.

Analysis of the other material aspect of Mr. Hitchcock's allegations—whether they sufficiently eliminate the potential nondiscriminatory reasons for racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race"—leads to the same conclusion. Critically, the Court's prior decisions demonstrate that allegations of racial discrimination are not "wholly incredible" even though the claimant's statistical analysis does not eliminate all of the nondiscriminatory factors that might explain a racial disparity.

While the statistical analysis must "eliminate[] the *most common* nondiscriminatory reasons" for the racial disparity, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. at 254 (emphasis supplied), it is not required to eliminate every

[75] The court of appeals also gave undue weight and speculative meaning to the Court's orders denying stays or disapproving grounds for stays in *Sullivan* v. *Wainwright*, 464 U.S. 109 (1983); *Wainwright* v. *Adams*, 466 U.S. 964 (1984); and *Wainwright* v. *Ford*, 467 U.S. 1220 (1984), when it reasoned that its "conclusion [respecting the insufficiency of the magnitude of racial disparity] is supported, and possibly even compelled, by recent Supreme Court opinions in [those cases]." *Id.* at 897. *See* n. 54, *supra*.

conceivable reason—either for the claimant to survive summary dismissal or for the claimant to prevail in an evidentiary hearing. *See also Bazemore* v. *Friday*, 106 S.Ct. at 3009. That there may be "many [other] factors go[ing] into" the allegedly discriminatory decisions does not defeat the prima facie case if it is otherwise sufficient to permit an inference of discrimination. *Id.* at 3010 n.14. While respondents may defend against a prima facie case on this basis in an evidentiary hearing, they cannot defeat it by simply "declar[ing] . . . that many [other] factors go into" the decisions. *Id.* Rather, they must "*demonstrate* that when these [other] factors [are] properly organized and accounted for there [is] no significant disparity . . . ." *Id.* (emphasis supplied). Accordingly, if the claimant's statistical analysis eliminates the most common nondiscriminatory explanations for discrimination, he or she is entitled to proceed to an evidentiary hearing, where all of the nondiscriminatory explanations deemed relevant by the parties can be presented, and in light of both parties' analyses, the trier of fact can determine whether "it is more likely than not that impermissible discrimination exists. . . ." *Id.* at 3009.[76]

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[76] Of course, the respondent in Mr. Hitchcock's case has never been required to make such a showing, since there has been no evidentiary hearing in the state or federal courts on his claim of discrimination. Indeed, since Mr. Hitchcock's presentation of the Gross-Mauro study in the district court on July 8, 1983, the study has been presented in numerous state and federal collateral proceedings, and to date, *no court has held an evidentiary hearing to consider it*. The Florida Supreme Court has consistently held, as with similar allegations predating the Gross-Mauro study, *see* n. 53, *supra*, that this study "do[es] not constitute a sufficient preliminary factual basis to state a cognizable claim" since being first presented with it in *Sullivan* v. *State*, 449 So.2d 609, 614 (Fla, 1983). *See Adams* v. *State*, 449 So.2d 819, 820-21 (Fla. 1984); *Ford* v. *Wainwright*, 451 So.2d 471, 474-75 (Fla. 1984); *Jackson* v. *State*, 452 So.2d 533, 536 (Fla. 1984); *State* v. *Washington*, 453 So.2d 389, 391-92 (Fla. 1984); *Dobbert* v. *State*, 456 So.2d 424, 429 (Fla. 1984); *State* v. *Henry*, 456 So.2d 466, 468 (Fla. 1984); *Smith* v. *State*, 457 So.2d 1380, 1381 (Fla. 1984); *Sireci* v. *State*, 469 So.2d 119, 120 (Fla. 1985); *Bundy* v. *State*, ___ So.2d ___, 11 F.L.W. 294 (Fla. 1986).

Similarly, the Eleventh Circuit held that no hearing was required when first presented with the Gross-Mauro study because it showed "nothing more than the statistical impact type case . . . previously held not sufficient to show the Florida system to have intentionally discriminated against petitioner." *Sullivan* v. *Wainwright*, 721 F.2d 316, 317 (11th Cir.), *stay denied*, 464 U.S. 109 (1983). Though the Eleventh Circuit expressed the view thereafter, in *Adams* v. *Wainwright*, 734 F.2d 511 (11th Cir. 1984), and *Ford* v. *Wainwright*, 734 F.2d 538 (11th Cir. 1984), that executions should be stayed pending its *en banc* decision in *McCleskey* in order to determine in light of *McCleskey* whether the Gross-Mauro study entitled Florida petitioners to evidentiary hearings, the Court's dissolution of the stay in *Adams*, *Wainwright* v. *Adams*, 466 U.S. 964 (1984), and rejection of this ground as a basis for the stay in *Ford*, *Wainwright* v. *Ford*, 467 U.S. 1220 (1984), convinced the Eleventh Circuit that its analysis in *Sullivan* had been correct. *See Washington* v. *Wainwright*, 737 F.2d 922, 923 (11th Cir. 1984); *Henry* v. *Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984); *Hitchcock* v. *Wainwright*, 745 F.2d at 1342; *Ford* v. *Wainwright*, 752 F.2d 526, 527 n.2 (11th Cir. 1985); *Thomas* v. *Wainwright*, 767, F.2d 738, 747-48 (11th Cir. 1985). The only exception to this consistent rule was *Griffin* v. *Wainwright*, 760 F.2d 1505 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1992, *vacated on other grounds*, 106 S.Ct. 1964 (1986), which remanded for the district court to consider "whether an evidentiary hearing is required [in light of the *en banc* opinion in *McCleskey*]." *Id.* at 1518.

Mr. Hitchcock's allegations plainly meet these threshold requirements. The studies by Gross and Mauro and other Florida researchers have explicitly taken into account the "most common" nondiscriminatory reasons for capital sentencing disparities based on race. As Gross and Mauro found, killing during the commisssion of a felony, killing multiple victims, and killing a stranger are all nondiscriminatory factors highly predictive of—that is, among the most common reasons for—a death sentence. Yet when these factors are taken into account, the likelihood of a defendant receiving the death sentence remains almost *five times* greater if the victim is white instead of black.[77]

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[77] It should be noted as well that Gross' and Mauro's accounting for the relationship between the defendant and the victim has eliminated two of the four factors presented by the State of Florida, in *Spinkellink* v. *Wainwright*, *supra*, as the nondiscriminatory reasons for the race-of-victim disparity in Florida's capital sentencing decisions. "As a general rule, the State contended, murders involving black victims have not presented facts and circumstances appropriate for imposition of the death penalty . . . [,] [such murders] hav[ing] in the past fallen into the category of 'family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels.'" 578 F.2d at 612 & n.37. Taking into account only homicides in which the defendant and the victim were strangers, however—thus eliminating homicides arising from family quarrels or lovers' quarrels—Gross and Mauro found that even in such circumstances, a death sentence was five times more likely to be imposed when the victim was white instead of black.

When Foley and Powell, and thereafter Bowers, controlled for the other two nondiscriminatory factors urged by the State—"liquor quarrels and barroom quarrels"—the race-of-victim disparities remained and were just as sizable. *See* Foley and Powell, n. 69, *supra*, at 18-22; Bowers, n. 69, *supra*, at 1073-75, 1078-81, 1083-86.

Moreover, the capital sentencing studies in Georgia and Mississippi by Baldus and Berk—which have eliminated all or virtually all of the potential nondiscriminatory reasons for racial disparities in capital sentencing—and the capital sentencing studies in Florida undertaken by Foley, Powell, and Bowers—which have eliminated potential nondiscriminatory reasons for these racial disparities in addition to those eliminated by Gross and Mauro—have led to identical findings concerning race-of-victim disparities. The disparities found by Gross and Mauro in Georgia, Mississippi, and Florida have not been reduced or explained when additional explanatory factors have been taken into account. Thus, it is reasonable to infer, as Gross and Mauro have, that their Florida study is just as valid an assessment of sentencing decisions.

Having demonstrated racial discrimination of an unconstitutional magnitude and having eliminated the most common nondiscriminatory factors that might explain away the racial disparities in Florida's capital sentencing decisions, Mr. Hitchcock's proffered statistics manifestly *permit* an inference of discrimination. Nothing more can be or should be required in order for a habeas claim to survive summary dismissal under the teaching of *Machibroda* and *Blackledge*. There is, however, an additional compelling reason for this conclusion in Mr. Hitchcock's case: the "unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing proceedings. *Turner* v. *Murray*, 106 S.Ct. at 1687.

As the Court recognized in *Turner*, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.* Since "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," *id.* at 1688, the Court was unwilling to tolerate that risk in a capital sentencing proceeding, even though it has been willing to tolerate it to a limited extent in non-capital trials. *Id.* at 1688 n.8 (distinguishing *Ristaino* v.*Ross*, 424 U.S. 589 (1976)).

What is shown starkly by Mr. Hitchcock's allegations is a far greater "risk of racial prejudice influencing . . . capital sentencing proceeding[s]" than was shown in *Turner*. The only showing of this risk in *Turner* was that the defendant was black and the victim white. *Id.* at 1694-95 (Powell, J., dissenting).[78] Here, in contrast, there are substantial and detailed factual allegations showing not only a greater *risk* of racial prejudice affecting capital sentencing, but also an *actual, measurable* (and measured) *effect* of racial prejudice upon capital sentencing proceedings during the very period within which Mr. Hitchcock was tried and sentenced.

The teaching of *Turner* is plain in relation to Mr. Hitchcock's claim. Because of the unique opportunity for racial prejudice to operate in capital sentencing proceedings, as well as the unique seriousness of its operation in this context, the Constitution requires greater attentiveness to the risk that racial prejudice may have been a factor in capital sentencing determinations. Where, as here, a methodologically-sound statistical analysis has found marked and systematic racial effects upon capital sentencing decisions, the claim drawn from that analysis is at least entitled to evidentiary consideration.

This consideration need not, of course, entail wide-ranging and cumbersome procedures. As Justice Brennan has recently observed, "[the Court has] long recognized that federal courts may employ intermediate factfinding procedures in determining whether a full hearing is necessary." *Vincent* v. *Louisiana*, ___ U.S. ___, 105 S.Ct. 928, 930 (1985) (dissenting from denial of certiorari). Among such procedures provided by the Habeas Corpus Rules are the limited use of discovery, Rule 6; the expansion of the record by, among other things, "answers under oath . . . to written interrogatories propounded by the judge," Rule 7(b); and prehearing conferences to "'limit the questions to be resolved, identify areas of aggreement, and explore evidentiary quesitons that may be expected to arise . . . ,'" Advisory Committee's Note to Habeas Corpus Rule 8.

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[78] Indeed Justice Powell indicated that the demonstration of this risk would have been stronger had Turner presented studies—apparently similar to the Gross-Mauro study—"purport[ing] to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants . . . in Virginia." *Id.*

Id. Accord Blackledge v. *Allison*, 431 U.S. at 81-83; *Machibroda*, 368 U.S. at 495. Indeed Mr. Hitchcock tried to utilize such procedures by filing a request for discovery in the district court directed to limiting the issues in dispute—requesting that the respondent enumerate "other factors . . . [that] may legitimately explain the disparities thus far revealed" and provide the data from the State's own records that would permit analysis of these factors. JA 33-34.

Such requests are routine in other contexts and are the bedrock upon which the factual disputes between the parties are narrowed. *See Bazemore* v. *Friday*, 106 S.Ct. at 3008 (noting that "[p]etitioners selected the[] variables [utilized in their regression analyses] based on discovery testimony by [respondents' employee] that four factors were determinative of salary"). Their utility in eliminating more costly procedures is well-recognized. *See* Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L.Rev. 1038, 1181 (1970).[79] Further, these intermediate factfinding procedures are critical to assuring the "'careful consideration and plenary processing of [the claim,] including full opportunity for presentation of the relevant facts,'" to which Mr. Hitchcock is entitled. *Blackledge* v. *Allison*, 431 U.S. at 82-83 (quoting *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969)).[80]

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[79] With the research already conducted by Gross and Mauro and other social scientists in Florida—and validated by the far more extensive research in Georgia and Mississippi—the utility of these intermediate factfinding procedures is especially apparent. Entire data sets like those constructed in Georgia and Mississippi need not be constructed in Florida. Instead, the particular nondiscriminatory factors that Florida officials believe will explain away the racial disparities can be identified, analyzed, and focused upon in a limited evidentiary hearing.

[80] This is particularly so with respect to this issue, for as Professor Gross has noted elsewhere, "[p]roof of discrimination in capital sentencing depends on studies that are far beyond the means of any capital defendant." Gross, *supra*, 18 U.C.D. L. Rev. at 1288. For an indigent like Mr. Hitchcock, this disability is insuperable. However, given the extent of the research already conducted in Florida—and the validation of Gross' and Mauro's methodology by the Baldus research in Georgia and the Berk research in Mississippi—the proof of discrimination in Florida should not and need not entail the undertaking of new studies "that are far beyond the means of any capital defendant." *See* n. 79, *supra*.

For these reasons, the dismissal of Mr. Hitchcock's claim without evidentiary consideration was error, requiring a remand for such consideration.

C. Conclusion: The Enduring Influence Of Race Discrimination

Among southern states, Florida has been extreme in its degradation of black people. Its approval of and reliance upon slavery, resistance to Reconstruction, devotion to white supremacy, enactment of Black Codes and innumerable other discriminatory statutes, and resistance well into the mid-years of this century to eradicating the badges and incidents of slavery, are well-documented. *See, e.g.*, Shofner, *Custom, Law, and History: The Enduring Influence of Florida's "Black Code"*, Fla Hist. Q. 277 (Jan. 1977) (focusing upon this history between 1865 and 1965); Vandiver, *Race, Clemency, and Executions in Florida: 1924-1966* (Dec. 1983) (Unpublished Master's Thesis, Florida State University) (copy provided to the Clerk of the Court).[81]

A persistent feature of this heritage has been official approval of and tolerance for violence against black people. As described by Professor Shofner, this method of subjugating black people became "firmly entrenched" after the failure of Reconstruction.

> As the possibility of United States intervention diminished in the 1880's and the doctrine of white supremacy became more firmly entrenched, violence as a means of repressing blacks increased. The brutal Savage-James

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[81] *See also McLaughlin* v. *Florida*, 379 U.S. 184 (1964) (state statute prohibiting interracial cohabitation); *Debra P.* v. *Turlington*, 474 F. Supp. 244, 251 & n.13 (M.D. Fla. 1979), *aff'd in pertinent part*, 644 F.2d 397, 407 & n.15 (5th Cir. 1981) (history of school segregation); *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (racial slurs); *Robinson* v. *Florida*, 345 F.2d 133 (5th Cir. 1965) (state statute authorizing arrest of persons seeking service at "whites only" establishments); *Baker* v. *City of St. Petersburg*, 400 F.2d 294 (5th Cir. 1968) (discrimination in classifications of police officers); *Dowdell* v. *City of Apopka*, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (municipal services); *State of Florida ex rel. Hawkins* v. *Board of Control*, 93 So.2d 354 (Fla. 1957) (admission to law school); *Jones* v. *City of Sarasota*, 89 So.2d 346 (Fla. 1956) (licensing).

> lynching at Madison in 1882 went without a serious investigation. Another in Jefferson County in 1888 resulted in the arrest of five white men, but all of them were acquitted by all-white juries. Two especially repugnant lynchings in the mid-1890's led Governor William D. Bloxman to deplore the practice in his 1897 inaugural address, but he offered no remedy. The praise of white supremacy and persistent reminders of its alternatives from prominent men perpetuated a climate of tolerance for violence by whites against blacks.

Shofner, Fla. Hist. Q. at 288.

In light of this legacy, the allegations made by Mr. Hitchcock must be taken as substantial indicia of the continuing effects of a way of life that is now universally condemned but not totally eradicated. The manifest commitment of the Constitution to "eradicat[ing] the last vestiges of a society half slave and half free," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 441 n.78, demands that these allegations be heard and be heard fairly.

Conclusion

For these reasons, Mr. Hitchcock respectfully requests that the Court issue its decision vacating the judgment and opinion of the Court of Appeals, and remanding this cause with instructions to issue the writ of habeas corpus unless the State of Florida resentences Mr. Hitchcock; or to conduct an evidentiary hearing with regard to the issues presented herein.

Respectfully Submitted,
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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution Of The United States

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes (1975)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of

defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Florida Statutes (1979)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

* * *

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

APPENDIX B

PRESENT STATUS OF DEATH SENTENCES IMPOSED IN FLORIDA PRIOR TO *LOCKETT* v. *OHIO*

1. Execution/Executive Clemency

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Adams, James	Mar 74	341 So2d 765 (1977)	aff'd	executed 5/10/84
Alford, Leo	Apr 76	307 So2d 733 (1975)	aff'd	executive clemency 6/19/79
Antone, Anthony	Apr 76	382 So2d 1205 (1980)	aff'd	executed 1/26/84
Dobbert, Ernest	Apr 74	328 So2d 433 (1976)	aff'd	executed 9/7/84
Dobbert, Ernest	Jun 78	375 So2d 1069 (1979)	aff'd	executed 9/7/84
Francois, Marvin	Apr 78	407 So2d 885 (1982)	aff'd	executed 5/29/85
Funchess, David	Jul 75	341 So2d 762 (1977)	aff'd	executed 4/22/86
Gibson, Richard	Jan 76	351 So2d 948 (1977)	aff'd	executive clemency 5/6/80
Goode, Arthur	Mar 77	365 So2d 381 (1979)	aff'd	executed 4/5/84
Hallman, Clifford	Oct 73	305 So2d 180 (1974)	aff'd	executive clemency 6/19/79
Henry, James	Jun 74	328 So2d 430 (1976)	aff'd	executed 9/20/84
Hoy, Darrel	Apr 76	353 So2d 826 (1978)	aff'd	executive clemency 6/12/80
Palmes, Timothy	Jun 77	397 So2d 648 (1981)	aff'd	executed 11/8/84
Raulerson, James	Aug 75	358 So2d 826 (1978)	aff'd	executed 1/30/85
Rutledge, Jesse	Dec 75	374 So2d 975 (1979)	aff'd	executive clemency 4/16/83

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Salvatore, Michael	Dec 75	366 So2d 745 (1979)	aff'd	executive clemency 3/17/81
Shriner, Carl	Apr 77	386 So2d 525 (1980)	aff'd	executed 6/20/84
Spenkelink, John	Dec 73	313 So2d 616 (1975)	aff'd	executed 5/25/79
Straight, Ronald	Aug 77	397 So2d 903 (1981)	aff'd	executed 5/20/86
Sullivan, Robert	Nov 73	303 So2d 632 (1974)	aff'd	executed 11/30/83
Thomas, Daniel	Apr 77	374 So2d 508 (1979)	aff'd	executed 4/15/86
Thomas, Daniel	May 77	403 So2d 371 (1981)	aff'd	executed 4/15/86
Washington, David	Dec 76	362 So2d 658 (1978)	aff'd	executed 7/13/84
Witt, Johnny	Feb 74	342 So2d 497	aff'd	executed 3/6/85

2. Resentenced Or Retried After *Lockett*

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Delap, David	Feb 76	350 So2d 462 (1977)	new trial	resentenced to death
Drake, Raymond	Jun 78	400 So2d 1217 (1981)	new trial	resentenced to death reversed 441 So2d 1079
Elledge, William	Mar 75	346 So2d 998 (1977)	resent w jur	resentenced to death
Ferguson, John	May 78	417 So2d 639 (1982)	resent w/o jur	resentenced to death
Jones, Leslie	May 75	362 So2d 1334 (1978)	new trial	resentenced to death
Lucas, Harold	Feb 77	376 So2d 1149 (1979)	resent w/o jur	resentenced to death vacated 417 So2d 250

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Magill, Paul	Apr 77	386 So2d 1188 (1980)	resent w/o jur	resentenced to death
Messer, Charles	Jan 75	330 So2d 137 (1976)	resent w jur	resentenced to death
Mikenas, Mark	Jul 76	367 So2d 606 (1979)	resent w/o jur	resentenced to death
Morgan, James	Dec 77	392 So2d 1315 (1981)	new trial	resentenced to death
Riley, Wardell	Apr 76	366 So2d 19 (1979)	resent w/o jur	resentenced to death
Rose, James	May 77	425 So2d 521 (1983)	resent w jur	resentenced to death
Spaziano, Joseph	Jul 76	393 So2d 1119 (1981)	resent w/o jur	resentenced to death pending cert. No. ———
Thompson, Willie	Jan 76	351 So2d 701 (1977)	new trial	resentenced to death
Valle, Manuel	May 78	394 So2d 1004 (1981)	new trial	resentenced to death

3. Resentenced To Life Or Convicted Of Lesser Offense

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Anderson, Allen	Oct 77	420 So2d 574 (1982)	new trial	not retried
Brewer, Patrick	Jun 78	386 So2d 232 (1980)	new trial	no death
Bryant, Alonzo	Nov 77	412 So2d 347 (1980)	new trial	no death
Coler, Daniel	Apr 78	418 So2d 238 (1982)	new trial	life on retrial
Coxwell, Chester	Jan 77	361 So2d 148 (1978)	new trial	life on retrial
Fleming, Myron	Jul 76	374 So2d 954 (1979)	resent w/o jur	life on resentencing
Foster, Clyde	Dec 74	387 So2d 344 (1980)	new trial	no death
Franklin, George	Nov 77	403 So2d 975 (1981)	new trial	life on retrial

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Freeman, Eddie	Apr 78	377 So2d 1152 (1980)	new trial	no death
Gafford, Danny	Nov 75	387 So2d 333 (1980)	resent w/o jur	life on resentencing
Hall, Freddie	Jun 78	403 So2d 1319 (1981)	reduced conv	no death
Hall, Jesse	Apr 76	381 So2d 683 (1980)	new trial	no death
Kilpatrick, George	May 77	376 So2d 386 (1979)	new trial	life on retrial
Lamadline, Michael	Jul 73	303 So2d 17 (1974)	resent w jur	resentenced to life
Lane, Hayward	Jul 77	388 So2d 1022 (1980)	new trial	no death
Lewis, Enoch	May 76	377 So2d 640 (1980)	resent w/o jur	no death
Lewis, Robert	Dec 76	398 So2d 432 (1981)	resent w/o jur	resentenced to life
Maggard, John	Apr 77	399 So2d 973 (1981)	resent w/jur	resentenced to life
Malone, Charles	Apr 78	390 So2d 338 (1980)	new trial	life on retrial
Manning, Derrick	Dec 76	378 So2d 274 (1980)	new trial	no death
Martin, Glen	Oct 75	360 So2d 396 (1978)	new trial	convicted of lesser
Miller, Jon	Oct 76	373 So2d 882 (1979)	resent w jur	resentenced to life
Mines, Winford	Jan 77	390 So2d 332 (1980)	resent w/o jur	resentenced to life
Moody, Eldred	Oct 77	418 So2d 989 (1982)	resent w/o jur	resentenced to life
Perri, Thomas	Jul 78	441 So2d 606 (1983)	resent w jur	resentenced to life
Perry, Donald	Nov 77	395 So2d 170 (1981)	resent w/o jur	resentenced to life
Ross, Frank	Oct 77	384 So2d 1269 (1980)	resent w/o jur	no death
Simpson, Willie	May 76	418 So2d 984 (1982)	new trial	convicted of lesser

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Surace, Bruce	Jun 76	351 So2d 702 (1977)	new trial	life on retrial
Tibbs, Delbert	Mar 75	337 So2d 788 (1976)	new trial	not retried
Wheeler, Wayne	Apr 76	344 So2d 244 (1977)	new trial	no death

4. Life Sentence On Direct Appeal

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Barfield, John	Mar 78	402 So2d 377 (1981)	life	
Brown, Henry	Aug 75	367 So2d 616 (1979)	life	
Buckrem, Franz	May 75	355 So2d 111 (1978)	life	
Burch, Jackson	Ma: 74	343 So2d 831 (1977)	life	
Chambers, Glen	Jul 75	339 So2d 204 (1976)	life	
Halliwell, Thomas	May 74	323 So2d 557 (1975)	life	
Huckaby, Benjamin	Jun 75	343 So2d 29 (1977)	life	
Jacobs, Sonja	Aug 76	396 So2d 713 (1981)	life	
Jones, Jimmy	Sep 73	332 So2d 615 (1976)	life	
Kampff, John	Jun 76	371 So2d 1007 (1979)	life	
Lee, Rudolph	Jun 75	340 So2d 474 (1976)	life	
Malloy, Rodney	May 76	382 So2d 1190 (1979)	life	
McCaskill, James	Dec 73	344 So2d 1276 (1977)	life	
McKennon, Roy	Apr 78	403 So2d 389 (1981)	life	
Neary, Jack	Apr 77	384 So2d 881 (1980)	life	

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Odom, Eddie	Oct 76	403 So2d 936 (1981)	life	
Phippen, James	Jun 78	389 So2d 991 (1980)	life	
Provence, Michael	Nov 74	337 So2d 783 (1976)	life	
Purdy, Clarence	Feb 75	343 So2d 4 (1977)	life	
Shue, Williams	Feb 77	366 So2d 387 (1978)	life	
Slater, Darius	Apr 74	316 So2d 539 (1975)	life	
Swan, Lloyd	Mar 74	322 So2d 485 (1975)	life	
Taylor, Joseph	Jul 73	294 So2d 648 (1974)	life	
Tedder, Mack	Jul 74	322 So2d 908 (1975)	life	
Thompson, Larry	Jan 74	328 So2d 1 (1976)	life	
Vasil, George	Dec 74	374 So2d 465 (1979)	life	
Williams, Clifford	Oct 76	386 So2d 538 (1980)	life	
Williams, Otis	Dec 73	344 So2d 1276 (1977)	life	

5. Other

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Agan, James	Sep 74	none		resentenced to life before appeal
Alvord, Gary	Apr 74	322 So2d 533 (1975)	aff'd	incompetent
Barclay, Elwood	Apr 75	343 So2d 1266 (1977)	aff'd	life ordered after state habeas, 444 So2d 956

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Brown, Joseph	Jul 74	381 So2d 690 (1980)	aff'd	vacated, 785 F.2d 1457
Carnes, Walter	Nov 74	none		suicide before decision
Darden, Willie	Jan 74	329 So2d 287 (1976)	aff'd	habeas denial aff'd 106 S.Ct. 2464
Dougan, Jacob	Apr 75	343 So2d 1266 (1977)	aff'd	resent ordered on state habeas, 448 So2d 1005
Douglas, Howard	Dec 73	328 So2d 18 (1976)	aff'd	death vacated 739 F.2d 531
Enmund, Earl	Sep 75	399 So2d 1362 (1981)	aff'd	life USSCt 458 US 782
Francis, Bobby	Jun 76	none		new trial ordered before appeal, resent to death
Gardner, Wilber	Jan 74	313 So2d 675 (1975)	aff'd	sentence vacated, 430 U.S. 349, resent life
Holmes, Monroe	Nov 75	374 So2d 944 (1979)	aff'd	died in prison
Jacobs, Eligaah	Feb 76	343 So2d 1266 (1981)	aff'd	vacated on state post-conviction
King, Amos	Jul 77	390 So2d 315 (1980)	aff'd	death vacated, 714 F.2d 1481
LeDuc, John	Jul 75	365 So2d 149 (1978)	aff'd	vacated in state post-conviction
Menendez, Antonio	Mar 76	368 So2d 1278 (1979)	resent w/o jur	life ordered, 419 So2d 312
Miller, John	Apr 74	332 So2d 65 (1976)	resent w/jur	resentenced to death, later reversed
Peek, Anthony	May 78	395 So2d 492 (1981)	aff'd	vacated in state post-conviction
Proffitt, Charles	Mar 74	315 So2d 461 (1975)	aff'd	sent vacated 685 F.2d 127 resent w/o jur to death

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Sawyer, Anthony	Oct 73	313 So2d 680 (1975)	aff'd	mitigated to life by trial court
Smith, Dennis	Mar 76	365 So2d 704 (1978)	aff'd	conviction vacated, 741 F.2d 1248
Vaught, Charles	Sep 77	410 So2d 147 (1982)	aff'd	life on state post-conviction
Walker, Ernest	Jun 76	none		suicide before decision

6. Pending—

a. Federal Habeas Corpus

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Armstrong, Sampson	Sep 75	399 So2d 953 (1981)	aff'd	habeas granted N.D. Fla. No. 82-309-Civ-T-15
Clark, Ray†	Sep 77	379 So2d 97 (1980)	aff'd	11 CA No. 86-3022
Cooper, Vernon	Jul 74	336 So2d 1133 (1976)	aff'd	11 CA No. 85-3583
Demps, Bennie†	Apr 78	395 So2d 501 (1981)	aff'd	11 CA No. 85-3485
Elledge, William†	Aug 77	408 So2d 1021 (1982)	aff'd	11 CA No. 86-5120
Ford, Alvin	Jan 75	374 So2d 496 (1979)	aff'd	pending competency hearing see 106 S.Ct. 2595
Foster, Kenneth	Oct 75	369 So2d 928 (1979)	aff'd	11 CA No. 86-3539
Hall, Freddie†	Jun 78	420 So2d 1321 (1981)	aff'd	11 CA No. 86-3073
Hargrave, Lenson	Jul 75	366 So2d 1 (1979)	aff'd	11 CA No. 84-5102
Jackson, Carl	Sep 75	359 So2d 1190 (1978)	aff'd	N.D. Fla. MCA-84-2087-RV

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Jackson, Ronald	Dec 74	366 So2d 752 (1978)	aff'd	11CA No. 85-3057
Knight, Thomas	Apr 75	338 So2d 201 (1976)	aff'd	11CA No. 86-5610, sub nom Muhammad
Meeks, Douglas	Mar 75	339 So2d 186 (1976)	aff'd	M.D.Fla. No. TCA-80-746-MP
Meeks, Douglas	Jun 75	336 So2d 1142 (1976)	aff'd	M.D.Fla. No. TCA-80-746-MP
Meeks, Douglas†	Sep 77	364 So2d 461 (1978)	aff'd	M.D.Fla. No. TCA-80-746-MP
Messer, Charles	Jun 76	403 So2d 341 (1981)	aff'd	11CA No. 85-3124
Stone, Raymond	Oct 75	378 So2d 765 (1980)	aff'd	N.D. Fla.No. 86-792-Civ-J-14
Tafero, Jesse	May 76	403 So2d 355 (1981)	aff'd	11CA No. 84-5908
White, Beauford†	Apr 78	403 So2d 331 (1981)	aff'd	632 F. Supp. 1140
Ziegler, William†	Jul 76	402 So2d 365 (1981)	aff'd	11CA Nos. 86-3310, 86-3311; also pending state post-conviction

b. Certiorari In Supreme Court Of The United States

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Aldridge, Levis	Jan 75	351 So2d 942 (1977)	aff'd	pending cert. No. 85-6956 after fed habeas denied
Harvard, William	Oct 74	375 So2d 833 (1978)	Gardner resent	pending cert. No. 86-5157 resent w/o jur 486 So2d 537 (Fla. 1986)
Hitchcock, James†	Feb 77	413 So2d 341 (1982)	aff'd	USSCt, No. 85-6756
Songer, Carl†	Aug 77	365 So2d 696 (1978)	aff'd	pending cert. No. 85-567 after sent vacated 769 F2d 1488

c. State Post-Conviction

Buford, Robert†	Mar 78	403 So2d 943 (1981)	aff'd	
Downs, Ernest†	Jan 78	386 So2d 788 (1980)	aff'd	mandamus
McCrae, James	May 74	395 So2d 1145	aff'd	
Sireci, Henry†	Nov 76	399 So2d 964 (1981)	aff'd	

SUMMARY: OVERALL CATEGORIES

Total Sentences Imposed 149
Total Defendants Sentenced** 145

1. Defendants Executed/Clemency 22
2. Defendants Retried/Resentenced after *Lockett* 15
3. Defendants Resentenced to Life or Convicted of Lesser Offense 31
4. Defendants Resentenced to Life on Appeal 28
5. Other Dispositions 23
6. Pending Cases—Defendants 26
   a. Federal habeas corpus
      pre-Cooper 11
      post-Cooper 7
   b. Certiorari
      pre-Cooper 2
      post-Cooper 2
   c. State Post-Conviction
      pre-Cooper 1
      post-Cooper 3
   Total
      pre-Cooper 14
      post-Cooper 12

*Citations to the direct appeal decisions in the Supreme Court of Florida are provided for reference purposes only; subsequent case histories are not cited.

**The difference between the total defendants sentenced and the total sentences imposed is caused by resentencing proceedings occurring prior to *Lockett* or multiple death sentences.

†-Sentencing occurring subsequent to the decision in *Cooper* v. *State*, 336 So2d 1133 (Fla. 1976).

SOURCE: This survey was prepared from data collected by Professor Michael Radelet, Department of Sociology, University of Florida, supplemented by reported decisions, current statitstics from NAACP Legal Defense Fund, *Death Row U.S.A.*, and present case status information provided by the Office of Capital Collateral Representative, Tallahassee, Florida. The data is current to August 7, 1986.

APPENDIX C

A SURVEY OF STATE COURT OPINIONS BETWEEN *PROFFITT* v. *FLORIDA* AND *LOCKETT* v. *OHIO*

FLORIDA, OHIO, ARIZONA

FLORIDA OPINIONS

Cases Where Only Non-*Lockett* Constitutional Claims Made:

Hargrave v. *State*, 366 So.2d 1 (June 1978)
Jones v. *State*, 362 So.2d 1334 (June 1978)
Raulerson v. *State*, 358 So.2d 826 (Mar. 1978)
Jackson v. *State*, 359 So.2d 1190 (Mar. 1978)
Spenkelink v. *State*, 350 So.2d 85 (Sept. 1977)
Gibson v. *State*, 351 So.2d 948 (July 1977)
Aldridge v. *State*, 351 So.2d 942 (June 1977)
Elledge v. *State*, 346 So.2d 998 (Apr. 1977)
McCaskill v. *State*, 344 So.2d 1276 (Apr. 1977)
Barclay v. *State*, 343 So.2d 1266 (Mar. 1977)
Chambers v. *State*, 339 So.2d 204 (Nov. 1976)
Meeks v. *State*, 339 So.2d 186 (Oct. 1976)

Cases With No Constitutional Claims:

Martin v. *State*, 360 So.2d 396 (June 1978)
Jacobs v. *State*, 357 So.2d 169 (Mar. 1978)
Adams v. *State*, 355 So.2d 1205 (Mar. 1978)
Buckrem v. *State*, 355 So.2d 111 (Jan. 1978)
Hoy v. *State*, 353 So.2d 826 (Dec. 1977)
Alford v. *State*, 355 So.2d 108 (Nov. 1977)
Sullivan v. *Askew*, 348 So.2d 312 (June 1977)
Surace v. *State*, 351 So.2d 702 (June 1977)
Harvard v. *State*, 375 So.2d 833 (Apr. 1977)
Thompson v. *State*, 351 So.2d 701 (June 1977)
Burch v. *State*, 343 So.2d 831 (Feb. 1977)
Huckaby v. *State*, 343 So.2d 29 (Feb. 1977)
Purdy v. *State*, 343 So.2d 4 (Feb. 1977)
Witt v. *State*, 342 So.2d 497 (Feb. 1977)
Adams v. *State*, 341 So.2d 765 (Dec. 1976)

Funchess v. *State*, 341 So.2d 762 (Dec. 1976)
Lee v. *State*, 340 So.2d 474 (Dec. 1976)
Knight v. *State*, 338 So.2d 201 (Sept. 1976)
Meeks v. *State*, 336 So.2d 1142 (July 1976)
Tibbs v. *State*, 337 So.2d 788 (July 1976)
Provence v. *State*, 337 So.2d 783 (July 1976)

Unclear

Proffitt v. *State*, 360 So.2d 771 (June 1978)

OHIO OPINIONS

Cases With *Lockett*-Type Claims:

State v. *Nabozny*, 375 N.E.2d 784 (May 1978)
State v. *Wiend*, 364 N.E.2d 224 (June 1977)
State v. *Bayless*, 357 N.E.2d 1035 (Nov. 1976)

Cases With Only Non-*Lockett* Constitutional Claims: Supreme Court

State v. *Curtis*, 375 N.E.2d 52 (Apr. 1978)
State v. *Wade*, 373 N.E.2d 1244 (Mar. 1978)
State v. *Adams*, 374 N.E.2d 137 (Mar. 1978)
State v. *Barker*, 372 N.E.2d 1324 (Feb. 1978)
State v. *Toth*, 371 N.E.2d 831 (Dec. 1977)
State v. *Shelton*, 364 N.E.2d 1152 (July 1977)
State v. *Downs*, 364 N.E.2d 1140 (July 1977)
State v. *Williams*, 364 N.E.2d 1364 (July 1977)
State v. *Osborne*, 364 N.E.2d 216 (July 1977)
State v. *Jackson*, 364 N.E.2d 236 (June 1977)
State v. *Perryman*, 358 N.E.2d 1040 (Dec. 1976)
State v. *Edwards*, 358 N.E.2d 1051 (Dec. 1976)
State v. *Osborne*, 359 N.E.2d 78 (Dec. 1976)
State v. *Harris*, 359 N.E.2d 67 (Dec. 1976)
State v. *Lockett*, 358 N.E.2d 1062 (Dec. 1976)
State v. *Lane*, *358 N.E.2d 1081 (Dec. 1976)*
State v. *Royster*, 358 N.E.2d 616 (Dec. 1976)
State v. *Lytle*, 358 N.E.2d 623 (Dec. 1976)

State v. *Hall*, 358 N.E.2d 590 (Dec. 1976)
State v. *Black*, 358 N.E.2d 551 (Dec. 1976)
State v. *Bell*, 358 N.E.2d 556 (Dec. 1976)
State v. *Hancock*, 358 N.E.2d 273 (Dec. 1976)
State v. *Woods*, 357 N.E.2d 1059 (Dec. 1976)
State v. *Strodes*, 357 N.E.2d 375 (Nov. 1976)

Court Of Appeals

State v. *Johnson*, 395 N.E.2d 368 (Nov. 1977)
State v. *Bridgeman*, 366 N.E.2d 1378 (Apr. 1977)

Cases With No Constitutional Claim. (Supreme Court)

State v. *House*, 376 N.E.2d 588 (May 1978)
State v. *Black*, 376 N.E.2d 948 (May 1978)
State v. *Cooper*, 370 N.E.2d 725 (Dec. 1977)
State v. *Miller*, 361 N.E.2d 419 (Mar. 1977)
State v. *Bates*, 358 N.E.2d 584 (Dec. 1976)
State v. *Roberts*, 358 N.E.2d 530 (Dec. 1976)

ARIZONA OPINIONS

Cases With *Lockett*-Type Claims:

State v. *Bishop*, 576 P.2d 122 (Mar. 1978)
State v. *Raymond*, 560 P.2d 41 (Dec. 1976)

Cases With Only Non-*Lockett* Constitutional Claims:

State v. *Ceja*, 565 P.2d 1274 (May 1977)
State v. *Holsinger*, 563 P.2d 888 (Apr. 1977)
State v. *Blazak*, 560 P.2d 54 (Jan. 1977)
State v. *Jordan*, 561 P.2d 1224 (Dec. 1976)
State v. *Lee*, 559 P.2d 657 (Dec. 1976)
State v. *Watson*, 559 P.2d 121 (Nov. 1976)
State v. *Ceja*, 546 P.2d 6 (Feb. 1976)

Cases With No Constitutional Claims:

State v. *Arnet*, 579 P.2d 542 (Apr. 1978)
State v. *Treadway*, 568 P.2d 1061 (July 1977)
State v. *Doss*, 568 P.2d 1054 (July 1977)
State v. *Murphy*, 555 P.2d 1110 (Oct. 1976)